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242 - 24593

VOL. 214 $\frac{2163}{70}$

E. F. DREW & COMPANY, Inc.,)
Appellant,)
vs.)
WALTER H. KIRK,)
Appellee.)

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

214 I.A. 626 1

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Circuit Court of Cook County in favor of the defendant.

The plaintiff, E. F. Drew & Com suit to recover the difference between the co 12 carloads of caustic soda, which it was all ration defendant had agreed to deliver from Jan 1916, to plaintiff, and the market price of soda purchased upon a refusal of defendant to perform the t written contract. A plea of the general issue was filed su ported by an affidavit of merits, in which it was alleged th the written instrument referred to in the declaration was a m memorandum of a sale contract which had by oral agreement been entered into by and between the plaintiff and defendant; the defendant, it is alleged, was acting only as a broker for the actual sale of the material.

There is a direct and sharp conflict in t dence as to what was said in the course of telephone co tions between E. F. Drew, president of plaintiff, and T F. Durrell on the one part, and William C. Dickinson, the defendant, on the other. The defendant is a mere broker doing business in Chicago, Illinois, in oils, glycerine and chemicals. The plaintiff, a New York

is a general merchant and deals in chemicals and other commodities, including caustic soda.

The evidence tends to prove that the defendant had at previous times acted as a broker for plaintiff. On August 7, 1915, defendant's manager, Mr. Dickinson, in a telephone conversation with Mr. Durrell offered to sell plaintiff caustic soda at $2.25 per hundred pounds f. o. b. Burlington, Ia. Mr. Durrell responded by offering a price of $1.80 flat per 100 pounds; in reply to which Mr. Dickinson stated that the offer was low, but that he would see what he could do about the matter. Following this conversation Mr. Dickinson telegraphed to the Churchill Drug Company at Burlington, Ia., and on the same day received a long distance telephone reply thereto from a representative of the Drug company. On August 9, 1915, Mr. Dickinson telegraphed plaintiff, "Can you better your bid on caustic? Think can buy at $2 Burlington. Walter R. Kirk." On the following day the plaintiff by telegram indicated a refusal to pay more than $1.80 for the material. On the same day Mr. Dickinson sent a telegram to the Churchill Drug Company; this telegram was excluded on objection of plaintiff. On the same day, August 10, 1915, Mr. Dickinson had a long distance telephone conversation with Mr. Drew, and a material dispute of fact in the case concerns what was said in the course of this conversation.

Mr. Dickinson testified that Mr. Drew informed him the soda was to be shipped to New York; that he, the witness, informed Mr. Drew of a telephone conversation which the witness had had with Mr. Hastings of the Churchill Drug Company; that Mr. Hastings, upon learning that plaintiff was the purchaser and

is a general merchant and deals in groceries and other commodities, including canned goods.

The evidence tends to prove that the defendant had at previous times acted as a broker for plaintiff. On August 7, 1919, defendant's manager, Mr. Dickinson, in a telephone conversation with Mr. Murrell offered to sell plaintiff canned goods at $2.25 per hundred pounds f. o. b. purchaser, Pa. Mr. Murrell responded by offering a price of $1.80 flat per 100 pounds; in reply to which Mr. Dickinson replied that the offer was low, but that he would see what he could do about the matter. Following this conversation Mr. Dickinson telegraphed to the Cornwall Tube Company at Washington, Pa., and on the same day received a long distance telephone reply therefrom from a representative of the Tube company. On August 9, 1919, Mr. Dickinson telegraphed plaintiff, "Can you better your bid on canned? Think can buy at $2 Washington, Pa." On the following day the plaintiff by telegram indicated a refusal to pay more than $1.80 for the material. On the same day Mr. Dickinson sent a telegram to the Cornwall Tube Company; this telegram was excluded on objection of plaintiff. On the same day, August 10, 1919, Mr. Dickinson had a long distance telephone conversation with Mr. Drew, and a material dispute of fact in the case concerns what was said in the course of this conversation.

Mr. Dickinson testifies that Mr. Drew informed him that he was to be shipped to New York; that he, the witness, informed Mr. Drew of a telephone conversation which the witness had had with Mr. Hastings of the Cornwall Tube Company; that Mr. Hastings, upon learning that plaintiff was the purchaser and

that the goods were to be shipped to New York, stated that the sale could not be made in the name of the Churchill Drug Company because of an agreement existing between that company and certain New York dealers; that if the material could be billed in defendant's name, he, Mr. Hastings, would make the sale and would agree not to hold defendant responsible; that he, Hastings, would look to the plaintiff as the buyer. The witness testified also that he informed Mr. Drew that the sale would be made upon these terms, providing Mr. Drew would not hold defendant responsible; that Mr. Drew responded by saying, "Go ahead and book the sale. We know the Churchill Drug Company, they are all right and we won't hold you responsible, but will look to the seller"; that Mr. Drew then requested the witness to send a memorandum of sale. Mr. Drew testified that he requested Mr. Dickinson to send him a confirmation of the sale; this confirmation, or whatever it may be called, is as follows:

"Not Liable in Damages for any Failure or Delay of Deliveries Arising from Strikes, Accidents, or other Causes beyond my Control.

Original.

Telephone Wabash 2090.
327 South LaSalle St.

Walter R. Kirk,
Oils, Fats,
Glycerine, Chemicals, Chicago, Aug. 16/15
Sold for Myself.

To E. F. Drew & Co., Inc., 50 Broad Str., New York, N. Y.

Quantity	Twelve (12) carloads of Caustic Soda
Quality	76% stock
Shipment	Two (2) cars monthly January-June inclusive 1916.
Price	$1.80 per one hundred pounds, f.o.b. Burlington, Iowa, basis of freight for shipment to New York $1.80 (basis 605)
Terms	Usual
Brokerage None (1Cc U.S. Revenue Stamp stamped "W.R.K. Aug.16, 1915").	

This Contract is Issued in Triplicate; One for the Buyer, One for the Seller, and One is being kept on File in my office.

Walter R. Kirk,
No. #138-D W. G. Dickinson."

[illegible]

Mr. Drew denied that anything was said in the course of the conversation indicating that defendant was acting for a principal. His testimony is to the effect that he dealt directly with the defendant through Mr. Dickinson; that nothing was said in the course of the telephone conversation of August 10, 1915, concerning the Churchill Drug Company; that at the close of the conversation he requested Mr. Dickinson to send a written confirmation covering the transaction; that the confirmation above set out was received by him, the witness, on August 13, 1915; that on August 10, 1915, the defendant wrote plaintiff as follows:

"Chicago, Aug. 10/15

E. F. Drew & Co., Inc.,
New York, N. Y.

Gentlemen:

I received your telegram of this morning reading as follows:

'One eighty is utmost we can pay Caustic January June basis sixty Burlington.'

and this is to confirm 'phone conversation with your Mr. Drew this morning wherein I inquired if this Caustic Soda is to go to New York, as I wished to know this on account of figuring freight rates, and he stated that it is, so wired you later as per enclosed copy and herewith hand you my confirmation #138-D to cover.

Thanking you very kindly for this order, I remain

Yours truly,
Walter H. Kirk.
W.G.Dickinson."

On the same day defendant sent the telegram following to plaintiff:

"As per phone conversation confirm two cars seventy-six caustic monthly January June inclusive one-eighty basis sixty f.o.b. Burlington, basis for shipment to New York.
Walter H. Kirk."

On August 11, 1915, the defendant sent the following letter to plaintiff:

"Referring to my confirmation of "D-138" covering Caustic Soda, I presume you understand that I am merely billing this for my undisclosed principal who is a perfectly responsible party.

Thanking you for the business, I remain

Yours very truly,
Walter H. Kirk."

On December 20, 1915, the plaintiff by telegram directed the defendant to ship the soda contracted for, "two carloads monthly Jan/June, please see that these are shipped per contract to New York." In answer to this telegram the defendant on December 22, 1915, wrote plaintiff as follows:

> "Your favor of the 20th inst. received and noted, which I have put before The Churchill Drug Co. for attention."

Mr. Drew testified that he knew nothing of the Churchill Drug Company's alleged connection with the transaction prior to the date that the above communication was received by plaintiff. Further correspondence and telegrams in the record disclose that on or about February 15, 1916, the plaintiff was unable to procure the soda agreed to be delivered to it under the contract between the parties, and that at this time a sharp controversy arose between plaintiff and defendant as to who was legally liable for the failure to comply with the terms of the contract.

In our opinion the judgment should be reversed and the cause remanded to the lower court for a new trial. We will not therefore express anything as to the weight of the evidence offered on the trial further than to say that excepting the theory of defendant that the Churchill Drug Company was mentioned in the telephone conversation of August 10, 1915, as the seller in the transaction and that defendant was referred to therein as its agent, there is nothing in the evidence or correspondence which tends to show that the plaintiff was informed that the drug company was connected with the transaction until about the time plaintiff began to press the defendant for a delivery of the soda under contract. In the letter dated August 11, 1915, the plaintiff does assert that he was acting in the matter for an undisclosed principal.

The material dispute between the parties is as to what was said during the course of the telephone conversation of August 10, 1915. The plaintiff asserts that he made the contract directly with the defendant and that nothing was said by the parties as to a third person, or that defendant was acting for a principal. On the other hand, the defendant's position is that the plaintiff was directly informed in the course of the conversation that defendant was acting merely as an agent. The determination then of this, a sharply contested question of fact, was the real issue in the case. As a matter of law if the defendant had acted as agent for an undisclosed principal, plaintiff might still pursue his action against defendant, or, if he saw fit to do so, against the undisclosed principal in the case.

In the case of Kudleman v. Haffenberg, 199 Ill. App. 463, it was held that where one undertakes to contract as agent for an undisclosed principal in a manner not binding the principal he becomes personally liable and that he cannot exonerate himself by showing an authority to bind one for whom he has undertaken to act.

Whatever may be said as to the inherent character of the instrument of August 10, 1915, known on the trial as "135-D", it is clear that it was executed by the defendant and gave in part his version of the telephone conversation, which defendant asserts expressed the terms of the contract between the parties. This instrument on its face purports to bind the defendant only. However, if it be assumed that it was a mere memorandum of the sale contract agreed to in the telephone conversation, then the trial court should have limited the introduction of evidence to such as tended to indicate what was agreed to by the parties thereto. The record shows, however, that the court admitted, over the objection of plaintiff, much evidence tending

to show that the defendant was in fact the agent of the Chemical Drug Company. Evidence was erroneously admitted of telephone conversations between the defendant and the drug company occurring sometime after August 10, 1915, which cannot be considered in any sense a part of the res gestae of the case. It may be assumed that the defendant was acting for the Chemical Drug Company. The disputed question on the trial, however, was whether the defendant had disclosed his agency to the plaintiff. Even the letter of August 11, 1915, merely asserts that the defendant was acting for an undisclosed principal and if his language be taken as it was written it could not release him as a party to the contract. Dean v. Dunkin, 17 Ill. 272.

While it is apparent that the trial court attempted to limit the admission of evidence to the material issue which the jury was called upon to determine, evidence was admitted of a series of telegrams between the drug company and defendant. Defendant insists that the plaintiff was informed of the fact that defendant was acting for the Churchill Drug Company, but that its name was kept out of the transaction because of a certain agreement which it had with other dealers. This fact was expressly denied by the plaintiff, and hence evidence that telegrams were transmitted between the defendant and the drug company and that conversations were had between the defendant, or his agent, and agents of the drug company, necessarily tended to keep the drug company's actual interest in the transaction before the jury.

Mr. Dickinson, defendant's agent, was permitted to testify that prior to August 10, 1915, the plaintiff had purchased soda through defendant from the Churchill Drug Company; and also as to what steps had been taken by the witness to supply the soda, contracted for by plaintiff, from the drug company. Numerous questions were asked and answers given touching the relations of the defendant with the drug company, which should have been excluded.

They were prejudicial, in that it is reasonable to suppose that the constant reiteration in the presence of the jury of matters concerning solely defendant's agency for the drug company might have led the jury to conclude that this matter was an issue in the case. The communications between the defendant and the drug company did not tend to corroborate the defendant's statement that his agency for the drug company was disclosed to the plaintiff. The evidence so admitted was in the main self-serving in character and where so much of the record is taken up with evidence of this sort, we think the cause should be retried.

In the case of Friske v. Orr, 169 Ill. App. 266, a case in important particulars similar to the case at bar, the court said:

> "The obvious purpose of this evidence was to corroborate appellee (defendant) in his version of the transaction, that is, that he received the jennets as agent only, of the appellant (plaintiff), for the purpose of selling them to Ralph, if possible, by showing that he afterwards attempted to do so. We think the evidence as to the statements made by appellee (defendant) to Ralph was incompetent and inadmissible. They were made long after the transaction and were therefore not a part of the res gestae, were made by appellee in his own behalf, and were self-serving in their nature. 'It is a general rule of broad application, that the declarations of a party in his own favor are not admissible in his behalf.' (Jones on Ev., Sec. 236, page 541.)
>
> In a close case on the facts, as is this, such evidence was necessarily prejudicial."

For the error of the trial court in admitting the evidence referred to the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

262 - 24613

LILLIAN B. JOHNSON,
Appellant,

vs.

WALDEN W. SHAW LIVERY COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

214 I.A. 626

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Circuit Court of Cook County in her favor and against defendant for the sum of $999.99.

Plaintiff brought suit against defendant for damages arising from personal injuries received by her on April 9, 1916, while riding in a public taxicab owned and operated by defendant. It is insisted on behalf of plaintiff that the verdict of the jury and judgment of the trial court is inadequate compensation for the injuries which she claimed she received as the result of alleged negligence on the part of defendant.

As the judgment is to be reversed and the cause remanded for a new trial, we do not care to express any opinion as to the merit of this contention other than to say that it is difficult to determine by what process of reasoning the jury arrived at the peculiar verdict rendered in the cause. Even if it be conceded that the verdict of the jury was inadequate compensation for the injuries which the evidence shows plaintiff sustained, we are not ready to hold that it was so much so as to indicate passion or prejudice on the part of the jury. The action was for unliquidated damages and a reviewing

court will not interfere with the determination of the question of damages by the jury unless it appears that the verdict is manifestly wrong or that it is the result of passion or prejudice. Bourke v. Anglo-American Prov. Co., 90 Ill. App. 225.

The testimony of the witness Dr. Darsche, who attended the plaintiff, as to the fair, reasonable, usual and customary charges for his services, was not admitted for reasons which are not made quite clear by the evidence as abstracted. A part of the examination of Dr. Darsche is as follows:

> "Q. What is the fair, reasonable, usual and customary charge by reputable physicians in Chicago, in the locality where you performed the services, for the services you rendered for Mrs. Johnson, the plaintiff in this case, pertaining to the injuries she received on April 9, 1916?"
>
> "MR. KEHOE: I object to the question, unless it is on the promise of counsel to follow it up by proper proof, connecting it up."
>
> "THE COURT: I think I will sustain the objection, unless you can show that Mrs. Johnson personally paid it, or assumed the bill."
>
> "MR. EVERETT: I have never understood that it is necessary for us to show that."
>
> "I rendered this service for Mrs. Johnson. I charged these services to Alex. Johnson, her husband."
>
> "MR. EVERETT: Now, I ask that the question be answered."
>
> "MR. KEHOE: I object to it now, because this question does not make it competent."
>
> "THE COURT: I made a ruling on it, because I know of no case which would allow a wife to recover for loss to the husband in her bringing the suit. I doubt whether any law, whether in law or in reason, a wife ought to be permitted to recover in her own suit for a loss that was had by her husband."

It is difficult to determine from the above quoted portion of the record whether the trial court ruled out the evidence offered by the witness as to the value of his services on the theory that it was incumbent on the plaintiff to show that she had personally paid the bill, or that by some act or words

she had assumed an obligation to pay it. The witness said he rendered the services for the plaintiff, but had charged her husband for them. If the services were in fact rendered to plaintiff, then she became primarily liable therefor and this is so irrespective of her marital relationship. If the liability to pay the doctor for his services was an obligation imposed primarily upon plaintiff's husband she would still be liable therefor under the statute as his wife. Where it appears, as it does here, that the services were rendered to a plaintiff who became thereby primarily liable for their fair value, such plaintiff is not required before the evidence as to the value of such services becomes admissible to show that she had either paid or had personally assumed payment therefor.

It is argued that the question put to the witness was faulty in that it was so framed that an answer responsive to it would include an assumption or an expression of opinion by the witness that the injuries for which he had treated plaintiff were caused by the accident which occurred on April 9, 1916. There is no dispute in the evidence that the plaintiff received certain injuries on April 9, 1916, and that the doctor rendered services for her in relation to those injuries. The inquiry was as to the value of services rendered by the doctor for the plaintiff "pertaining to the injuries she received on April 9, 1916;" this question does not, as urged, call for an opinion of the witness as to whether the injuries for which he attended plaintiff resulted from the accident. It was competent for the doctor to testify that the services rendered to plaintiff were for injuries which she received on April 9, 1916. There is nothing in the question which calls for an opinion as to whether these injuries, or plaintiff's subsequent condition, where the result of the accident or of some other cause.

On another trial of the case the present difficulty no doubt will be obviated by the introduction of evidence which will remove any doubt as to the admissibility of this evidence. On the record before us we think the testimony of this witness as to the value of the services which were rendered to the plaintiff was admissible.

It will not be necessary to consider other questions presented as for the reason stated the judgment of the Circuit Court must be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

328 - 24679

WILLIAM DOWNS, Appellant, vs. CHICAGO MASTER STEAMFITTERS ASSOCIATION, FRANK DONOHUE, ALEX FAIRCHILD, W. R. HARRISON, CHARLES JOHNSON, JOHN MANGAN, CHARLES RAU, JOHN DURKIN, JAMES CHRISTIANSON and THOMAS COOK, Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

214 I.A. 626

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County dismissing the bill of complaint filed by William Downs, complainant, against Chicago Master Steamfitters Association (to be hereinafter referred to as the "Association"), Frank Donohue, Alex Fairchild, W.R.Harrison, Charles Johnson, John Mangan, Charles Rau, John Durkin, James Christianson and Thomas Cook, defendants.

The bill alleges that the complainant during the years 1917 and 1918 was engaged in the business of installing plumbing and heating fixtures in certain large buildings in Chicago and that he would have received large gains therefrom but for certain unfair and unlawful acts of defendants.

The bill charges that the membership of the Association consists of contractors engaged in the steamfitting and steam-heating business; that it had entered into an agreement with the Steamfitters Protective Association, Local Union 597 (to be hereinafter referred to as the "Union"), which agreement, though not unlawful upon its face, was entered into for the purpose of suppressing competition and creating a monopoly in the steamfitting and steam-heating business.

The bill also charges that laws enacted by the State of Illinois and its cities, villages and towns provide rules and regu-

lations for the installing of heating and plumbing fixtures in buildings; that complainant had at all times complied with these laws; that the Association under certain of its by-laws had endeavored to create a monopoly and control of said business; that Section 5 of Article 3 of its by-laws provides for a Standardization Committee, whose conclusions and recommendations were to be followed by the members of the Association "in the work in which they may be engaged, and to compel the standards so created to be accepted and followed by members in other similar lines;" that the committee was authorized to appoint an engineer to whom the members of the Association were required to submit all working plans for inspection and approval; that when approved by him such plans were to be stamped and that he was thereafter to inspect the work and see that it complied with the plans and that said engineer was to be paid for his services a sum not to exceed one-half of one per cent of the contract price for the work to be done; that "the duty of said committee was not to create and maintain standards, but that its purpose was to fix and determine prices at which the members should enter into contracts; the fixing of prices at which the Bosses Association will allow work to be done, and to determine what members of said Association the contract should be let to, all of which the bill charges is in violation of law, fraudulent, illegal, unnecessary and unreasonable, not required by any law or ordinance, but created as a penalty upon complainant, and other steam-fitting contractors, and is a fraud upon complainant, and is in restraint of fair competition and trade, and against public policy."

The bill also alleges that the laws of the Union provide for what is commonly known as a "Walking Delegate" whose duty it was to see that members of the Union were not allowed to work without a clear working card or permit; that any failure on the part of a member to comply with the ~~xxxx~~ order of the Walking Delegate rendered the member liable to a penalty of suspension or expulsion from the Union "notwithstanding the fact that said orders of said Walking Delegate

may be directly in violation of law, against public policy, illegal and void."

It was further alleged that about two years before the filing of the bill the plaintiff was induced to become a member of the Association on representations that it had "the ability to avert strikes and labor troubles of its members"; that after becoming such he learned that the Association's real purpose was to control and regulate prices; that contracts for work could not be figured on without submittingthem to its engineers and "having the contract price fixed, and entirely governed by said Association, in accordance with its rules, notwithstanding that said prices might be and were unfair, illegal and contrary to law."

It is charged that the Association's real purpose and conduct constituted a fraud upon the public, as the result of which competition was suppressed and exorbitant prices were charged for work; that the Association in furtherance of its scheme to fix prices and create a monopoly had entered into an agreement with the Union; that this agreement upon its face "was for the purpose of preventing strikes", etc., but that the agreement was entered into so that strikes could be called by a joint conference board of the Association and the Union, so that a more mercenary, illegal and monopolistic condition was created; that as a result of said agreement between the Association and the Union the complainant was forced and blackmailed into paying certain specified sums; that plans for doing contract work upon which members of the Union were to be employed, were to be stamped by an inspector of the Union.

The allegations of the bill are lengthy; only a part of them have been referred to, and that for the purpose of indicating the apparent general purpose of the pleader. It may be said that the bill sets up the existence of the Union and the Association; the agreement entered into between them which is referred to above; that this agreement is not objectionable upon its face, but that

may be directly in violation of the, original Jewish civilization, Hebrew and Arab.[1]

It was Ussishkin alone who seemed the same before the Zionist congress of the 21st: the physically was inherent in instinct a feature of the Ashkenazim an representations that it had "the ability to create artifacts and lasting structures of its culture", that after Dreyfuss would be learned that the Ashkenazim's own patrons had to resident and Prussian citizens; that generations had which could not be figures as Hebrew intellectuals in its religions and "having the national pride first. Not political provoked by anti Semitism, it "awaken- ment with its culture, universalizing that well crises might be and were natural. Israel was contrary to law.[1]

It is charged that the Ashkenazim's real purpose was simply moral and a Jewish work the public, as the result of which complaints was suggested its administrators which Zionist for ever; that the Ashkenazim is forbearance of its nature to the Jewish and remain a minority and retain life to intermarry with the Talmud; that with agreement would its time "may for the purpose of civilizing citizen". Ah., but that the administrator was returned into an idea which is unlike or unlike or a joint conference board of the Ashkenazim and the Arabs. We also a more extremely. Israel and metaphysical consideration was created: that is a result of more sympa- ment between the Ashkenazim and the Jews the complaints was Turkish and fundamental lack political material opposition: that place for giving remedies work upon which members of the Zionist work to be required. were is be changed by an instrument of the Arabs.

The civilization of the Bill was Jewish; only a part of them have been refused it, and that for the purpose of facilitating the expressed common purpose of the Zionist. It may be said that the Bill sets up the adherence of the Jews and the Zionists: the extremist minded Jews whose which is referred to above; that this agreement is not civilization with the Turk. The Bill

the parties thereto, in violation of public law and policy, had for their intent and purpose a suppression of competition and the creation of a monopoly. The bill recites no facts in support of such conclusions. No allegations of fact appear therein from which any conclusion may be drawn that the parties to the agreement intended to, or in fact had, entered into the agreement for any purpose violative of public law or policy. It is charged, however, that the complainant, a plumbing and steamheating contractor, had in his employ six men who were members of the Union; that in August, 1917, a business manager of the Union ordered these employes to quit working for complainant for the reason that he did not have the stamp of the Association's inspector; that complainant, not being a member of the Association, was unable to procure the inspection and stamp of the plans for work that was being done by him; that he had refused to comply with the fraudulent and wrongful demands of said conspirators and to pay the penalties or any of them imposed by the Local Union; that the workmen referred to continued thereafter to work for complainant until March 11, 1918, when by order of the Union agent they were compelled to and did quit working for complainant; that the complainant "refused to pay fines and penalties" which were threatened to be imposed upon him for the protection of the "Bosses"; that he had refused to submit his plans to the inspector of the Union or to pay any sums demanded; that he would not permit defendants or any of them, to fix the prices on work which he was to perform; that as a result of his attitude and conduct he was prohibited from retaining the services of said employes and that he had sustained large losses thereby; that due to the unlawful conspiracies referred to he had been prevented from carrying on his business; that the rules and unlawful orders now enforced against him are not reasonable regulations of said Association, and that neither complainant nor his employes are bound to obey such illegal orders.

The bill prays that the Association shall be dissolved;

that its members be restrained from carrying into effect its illegal acts, rules, laws and conspiracies, or from attempting to force complainant to have his plans and specifications passed upon in accordance with the rules of the Association, or "from being compelled to submit his plans to the same or to require the approval of the Local Union's engineer or the payment of any penalties whatsoever for the approval of plans;" that defendants be enjoined from interfering with the business of complainant and "from inducing employes to leave by threats or otherwise his service; from preventing people from entering into the service of complainant; from interfering with his business and from suspending the employes of complainant who may be members of the Local Union No. 597 from membership in the Union because of their desire to work for complainant."

Answers supported by affidavits were filed by the several defendants. A motion was made by complainant in the trial court for a preliminary injunction, which motion was denied. A part of the order denying the motion is as follows:

> "And the court being convinced from its consideration of said bill of complaint and affidavits in support thereof, answers of defendants and affidavits in support of said answers, that the complainant is not entitled to the relief prayed for in his bill of complaint, and would be entitled to no relief upon a further hearing on said bill or upon an amendment to said bill, it is ordered that complainant's bill of complaint be, and the same is, hereby dismissed for want of equity."

The bill of complaint is voluminous and in general terms charges that a conspiracy existed between the several defendants, as the result of which complainant was deprived of the services of six workmen. Taking the allegations of the bill as written, it cannot be held that it appears therefrom by facts or acts set forth, that the conduct of the parties defendant was unlawful or oppressive. The agreement between the Association and the Union,

[illegible]

[illegible]

[illegible]

as the result of which, it is asserted, a conspiracy was formed to injure the complainant, is admitted by him to be a joint agreement for the purpose of preventing strikes, etc. If this agreement, which appears upon its face to be one for the amicable adjustment of disputes between employers and employes, was in fact a means adopted to consummate a conspiracy to injure the complainant, then the bill should have alleged facts indicating how this injurious consequence was brought about.

The order denying the motion for a preliminary injunction, not being a final order, is not appealable. It is insisted, however, that the chancellor erred in dismissing the bill for want of equity in that the bill seeks relief in addition to the injunction relief prayed therein. A bill in equity which properly seeks other than injunctive relief and which a court of chancery has power to grant, should not be dismissed for want of equity upon the denial of a motion for a preliminary injunction.

We are inclined, however, to hold with the contention of the defendants that where a bill of complaint seeks injunctive relief and in addition thereto prays for other relief, and where it appears upon the face of the bill that the party complainant is not entitled to the injunctive relief or the other relief prayed for, the bill should be dismissed for want of equity.

In Leonard v. Garland, 252 Ill. 300, the Supreme Court said:

> "A motion to dissolve a temporary injunction for want of equity in the bill under the rule established in this State operates as a demurrer to the bill and is considered as an admission of the material allegations thereof."

as the result of malice, it is accident, a consequence one cannot
in fairness the complainant, is entitled to sue in a local
appropriate for the purpose of preventing errors, etc. If this
approach, which governs upon the view as to who has the authority
authorities of criminal defamation actionable not criminal, and in
fact a person accused of misconduct a complainant is entitle the
complainant. Thus the bill should only attract facts indicating
how this injunctive remedy has brought about.

The other matter has relation to a preliminary in-
junction, not issued a final order, is not appealable. It is
initiated, however, that the chancellor erred in dissolving the
bill for want of equity in that the bill would relief in addi-
tion to the injunction relief sought therein. A bill in equity
which prematurely seeks other than injunctive relief not which a
court of chancery has power to grant, should not be dismissed
for want of equity upon the denial of a motion for a preliminary
injunction.

In our opinion, however, we hold with the contention
of the defendants that such a bill of complaint seeks injunctive
relief and is entitled to retain jurisdiction, and dismiss
it upon the face of the bill that the basic complaint
is not actionable in the injunctive relief or the final relief
sought for, the bill should be dismissed for want of equity.

In Lawrence v. Gardner, 481 Ill. 544, the Supreme
Court said:

"A defamation is actable a temporary injunction if the
of equity in the bill shows the acts established in the state
operates as a damager to the bill and is remediable on an ad-
ministration of the material allegations Thereof."

In Peoria Ry. Co. v. Peoria Terminal Company, 252 Ill. 73, it was held that a bill not obnoxious to a general demurrer would not be dismissed for want of equity upon an application for a temporary injunction unless the issues are joined and the whole case submitted. Ordinarily, proper practice would require the trial court to hear and determine issues presented by the pleadings in a case in some manner other than by mere motion. Where, however, it appears, as we believe it does here, that the motion properly presented to the chancellor a consideration of the whole subject of complainant's right to relief, and where also it appears from the face of the bill that none of the relief which the complainant seeks is obtainable in a court of equity it becomes the duty of the chancellor to dismiss the bill for want of equity.

Complainant's theory, as we understand his bill, is that he has been injured as the result of a conspiracy between the defendant which caused six of complainant's workmen to quit their employment. Even if it be conceded that the defendants did co-operate together for the purpose of depriving the complainant of the services of the six workmen, members of the Union, and that such conduct was in fact unfair to complainant, we are not advised that a court of chancery has power to grant him the sort of relief he prays for. If, as a matter of fact, the defendants by joint agreement required the complainant to submit contract plans etc., to the inspection of agents of the Union or of the Associations and to secure the approval of such agents before members of the Union were permitted by the Union to be employed by complainant, this fact, in and of itself, would not authorize the trial court to interfere in the matter.

In Ferris, op. c., Martin Tupper's Proverbs, 128 (1).

73. It was held that a will not dependent in a general manner would not be finalized for ways of applying such an application for a temporary injunction unless the issues are joined and the whole case considered. Practically, proper practice would require the trial court to hear and determine issues presented by the pleadings in a case in some manner other than by mere motion. There, however, it appears, as we believe it does here, that the entire property passes to the association a consideration of the whole subject of complainant's right to relief, and where also it appears from the face of the will that some of the relief which the complainant seeks is obtainable in a court of equity it becomes the duty of the chancellor to dismiss the bill for want of equity.

Complainant's theory, as we understand his bill, is that he has been injured as the result of a conspiracy between the defendants which caused his or complainant's mother to quit their employment. Now if it be conceded that the defendants did co-operate together for the purpose of depriving the complainant of his services of the six months, wages of the minor, and that such conduct was in fact unlawful to complainant, we are not satisfied that a court of chancery has power to grant him the sort of relief he asks for. If, as a matter of fact, the interference by Peter Lynnmount caused the complainant to submit instead plans etc., is the interpretation of wages of the minor of the Restatement and is whether the injured of such wages inure wholly of the minor was permitted by the minor to be enjoyed by complainant, this fact, in and of itself, would not determine the final course in interpleas in the matter.

In Franklin Union v. People, 220 Ill. 355, the Supreme Court said:

> "It will be readily conceded by all that labor has the right to organize as well as capital, and that the members of Franklin Union No. 4 (being a labor union) had the same legal right to organize said union as the members of the Chicago Typothetae (being an association of employers) had to form that association, and that the members of Franklin Union No. 4 had the legal right to quit the employment, either singly or in a body, of the members of said association, with or without cause, if they saw fit, without rendering themselves amenable to the charge of conspiracy, and that the courts would not have been authorized to enjoin them from so doing even though their leaving the employment of the members of the association involved a breach of contract."

Kemp v. Division No. 241, 255 Ill. 213, 221.

Complainant's case is not aided by the allegation in the bill that the agreement between certain of defendants was against public policy in that it tended to suppress competition and create a monoply. Here again the bill is defective in that this fact is stated by way of conclusion; it does not appear from the bill how this illegal result was accomplished by the doing of acts which are concededly legal. If the agreements and conduct of the defendants were lawful and within their rights a court of equity will not restrain such conduct solely because it is informed by way of conclusion that unfair and oppressive purposes underlie the acts of the parties. The complainant is not entitled to the injunctive relief prayed for. Cordates v. City of Chicago, 129 Ill. App. 471, 475.

In the instant case the employer seeks to enjoin the Union from disciplining certain of its members. They are not parties to the bill and they are not requesting that the court interfere in their behalf.

In numerous cases the Supreme Court of this state has held in effect that voluntary associations should be left free to enforce their rules and regulations by such reasonable means and penalties as they might see fit to adopt. People

In Prudhoe Dams v. Ingram, 100 Ill. App. 3d, the

Supreme Court said:

> "It will be readily assumed by all who know the
> Dam Sites in question we will be mistaken, and that the
> members of Prudhoe Dams Co. I think, a better motive than
> the mere legal right to appeal with which to the Supreme
> Court of the Illinois Appellate Court by instituting of employees
> [illegible] these proceedings, and that the members of
> Prudhoe Dams Co. [illegible] right to call the
> employees, either single or in a body, of the members of
> said association, with or without cause. If they see fit,
> without [illegible] employees in the change of
> employment, and that the course which the Dam Sites
> authorities [illegible] Dams Co. [illegible] Thus
> having the [illegible] of the members of the association
> imposed a burden of [illegible]."

Ibid v. Jackson Co. Ill. 100 Ill. App. 3d, 426.

Employment's case is not alone in the allegation in the

suit that the alleged actions of defendants has caused

public belief in that it tended to discourage complaints and create

a monopoly. Since again the Act is defective in that this Act is

aimed by way of inequities; it does not assure from the bill

the bill illegal result was accomplished by the doing of acts

which are reasonably legal. If the allegations and conduct of the

defendants were lawful and which should plaintiff a cause of equity

will not [illegible] such conduct solely because it is influenced by

any of considerations that motive and aggressive purposes underlie

the acts of the parties. The complainant is not entitled to the

injunctive relief sought for. Commonwealth v. Chas. of Commerce, 249

Ill. App. 478, 479.

In the Sanders case the employer sought to enjoin the

Union from discriminating against of its members. They are not

parties to the bill and that are not responsible for the other

associations in their behalf.

In answering since the Supreme Court of this State

has held in effect that voluntary associations should be left

free to enforce their rules and regulations by most reasonable

means and penalties as they might see fit to enjoy. Little

ex rel. Rice v. Board of Trade of City of Chicago, 80 Ill. 134; Engel v. Walsh, 258 Ill. 98.

The bill charges that the Association by its rules and practices and through what is called a "Standardization Committee" has attempted to compel contractors in the matter of installation of steamfitting and plumbing work to comply with certain standards fixed by the Association or its committee in contravention of powers vested in the cities, villages and towns. It does not appear by the bill that this practice in any way amounted to a fraud upon the rights of complainant, that it is in violation of any law, or that it is in restraint of trade and against public policy.

The bill prays that the Association "as a matter of public policy for the protection of the public shall be dissolved" etc. So far as it is possible from the bill to determine the character of the Association it is to be regarded as a corporation not for pecuniary profit. Under Illinois statutes and decisions only the state can complain of injuries to the public by such a corporation.

In Shriver v. Day, 276 Ill. 403, it was held that -

> "The existence of a corporation or the legality of its organization cannot be inquired into by a bill in chancery. The law provides an adequate remedy in such case by quo warranto, and such remedy is exclusive. Equity has no jurisdiction.

In Coquard v. Nat'l. Linseed Oil Co., 171 Ill. 480, the Supreme Court said:

> "Only the state can complain of injury to the public or that public rights are being interfered with, and enforce a forfeiture of defendant's franchise for that reason."

The bill contains a prayer for an accounting. This prayer is based upon the allegations that complainant was "robbed of, held up, sandbagged and blackmailed into paying,

[illegible] v. [illegible] 17 Ill. 2d [illegible];
[illegible] v. [illegible], 326 Ill. 2d.

The Ill. Supreme Court the interpretation of the rules and practices and criteria which is called a "discretionary consideration" has recognized it ought particularly to the ability of interpretation of constitutional and statutory which to consider this serious standards first of the determination on its questions to interpretation of power vested in the action, violations and terms. It does not appear for the Ill. Ct. which problem in any way connected in a final form the rights of complainant, that it is in violation of any law, or that it is in violation of treaty and against public policy.

The Ill. Court that the determination "is a matter of public policy for the protection of the public which is discretion" etc. So far as it is possible from the Ill. to determine the character of the discretion is to be regarded as a corporation not for pecuniary profit. Under Illinois statutes and decisions only the state can complain of injuries to the public by such a corporation.

In [illegible] v. [illegible], 272 Ill. 2d, it was held that -

> "The existence of a corporation or the legality of its organization cannot be inquired into by a writ in chancery. The law provides an adequate remedy in such case by quo warranto, but that remedy is exclusive. Equity has no jurisdiction."

In [illegible] v. [illegible] Ill. 2d., 272 Ill. 2d, the Supreme Court said:

> "Only the state can complain of injury to the public or the public rights are being interfered with, and enforce a forfeiture of corporate franchise for that reason."

The Ill. contains a proper for an injunction. The power to issue writs for injunctions that complainant was "relief of, being by, restraining and illegal,

illegally and wrongfully, certain sums of money." The exact sums and the dates of payments to certain defendants are specifically stated in the bill and it is alleged therein that these sums, amounting in all to $1,189.13, were wrongfully imposed upon complainant as penalties. Facts are not alleged in support of the charge that the payments were wrongfully imposed. The allegation also is a conclusion of the pleader, but in any event no reason appears why the complainant's remedy at law in this particular is inadequate. No discovery is sought by the bill, and it appears therein that the complainant charges that the defendants are indebted to him on seven specific items. The allegation involves no question of mutual accounts or credits. James T. Hare Co. v. Daily, 161 Ill. 379, 384; 1 Corpus Juris, 613, 616.

In McCormick v. Page et al., 96 Ill. App. 447, the court said:

> "The bill before us prays an accounting between complainant and defendants, but states no case requiring an accounting in equity, but it charges the payment of but one sum of money, the precise amount of which is stated by the pleader."

The trial court did not err in denying the motion of plaintiff to amend its bill. The bill upon its face was insufficient to authorize the chancellor to grant any relief prayed for therein. At the time the motion to amend was made and denied complainant did not indicate in any way the nature of the proposed amendment. From the character of the relief sought by complainant it was evident to the chancellor that the bill could not be amended so as to authorize the court to interfere by restraining order.

In Dilcher v. Schorik, 207 Ill. 529, the court said:

> "But if the petition could have been amended no amendment was presented, and the motion did not state in what respect appellant proposed to amend the petition. he does not even now suggest what amendment he desired to make or could have made, but says the amendment was

illegality and unreliability, perhaps some of money." The amount sum and the dates of payments in certain instalments are specifically stated in the bill and it is clearly therefore that these sums, amounting in all to £3,[illegible], were wrongfully imposed upon complainant as penalties. There can not exist a doubt of the justice that the plaintiff was wrongfully imposed. The allegation also is a conclusion of the pleader, but in any event no evidence appears that the complainant's remedy at law in this particular is inadequate. Its discovery is sought by the bill, and it appears further that the complainant charges that the defendants are insolvent in fact on some specific items. The allegation involves an evasion of mutual accounts or credits. Lewis v. Ruff, 38. v. Craig, 141 Ill. 379, 384; 2 Cooper Ch. 215, etc.

In Gardner v. Ogden et al., 96 Ill. App. 487, the court said:

> "The bill refers to years of accounting between complainant and defendants, but states no case requiring an examination in equity. The ill charges the payment of the sum due at a time, the giving account of which is stated by the pleader."

The court could not see to analyze the action of plaintiff in making his bill. The bill upon its face was insufficient to warrant the conclusion it gives any relief beyond the remedy. In the case the action to annul the mutual complainant bill not indicate in any way the nature of the proposed accounting. Upon the observation of the learned judge of complainant it was evident to the chancellor that the bill could not be sustained as an injunction for debt is intended to restrain action.

In Gardner v. Ogden, 96 Ill. 487, the court said:

> "This is the position which has been taken in an analogous case presented, and the action did not state in what respect equitable property is owned the petition. In case not even now assigned that complainant is entitled to that it would have such. Yet such the complaint are

presumably to meet some objection to the petition. A party is not entitled, as of right, to have leave to amend a pleading regardless of what the amendment is to be. A party who desires to file an amended pleading should prepare and submit it to the inspection of the court.

A principal relief sought is indicated in the prayer that the union be restrained from disciplining the six workmen formerly in the employ of complainant and that the court should interfere in such manner as that the workmen would be permitted to work for him and also to retain their membership in the Union. These workmen were not compelled either to work for complainant or to become members of the Union. If they chose the latter course then they necessarily became subject to the Union's rules and regulations and the courts will not interfere with such voluntarily created relationship.

In our opinion the bill in question was obnoxious to a general demurrer and the chancellor was authorized to dismiss it for want of equity on the motion for a preliminary injunction.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

351 - 24703

MAE E. CARROLL,
Appellee,

vs.

PATRICK C. FAHERTY,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

214 I.A. 626[4]

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County against the defendant and in favor of the plaintiff for the sum of $1,200.

Plaintiff's suit is based upon a claim that the defendant while acting as her agent in the purchase of real estate had falsely represented to her that he paid for the property, as her agent, the sum of $110 per front foot, whereas the price actually paid by him was $85 per front foot; that as a result of such false representations the defendant had overcharged plaintiff in the matter the sum of $939.60. The judgment is for this sum with interest thereon at the rate of 5 per cent.

The brief filed by counsel for plaintiff is in substance a recapitulation of the assignment of errors. The points made are not argued therein. It is asserted that the trial court erred in its rulings on the admissibility of evidence, but what the errors consist of or what rulings of the trial court are complained of here are not indicated in the brief filed by defendant.

The evidence heard upon the trial was contradictory. There was, however, evidence introduced which tended to prove that the defendant had, as charged, misrepresented the purchase price paid for the property in question. He admitted,

in his testimony, that the money of the plaintiff had come into his hands as the result of a sale by him of certain lots belonging to her. He was unable to say, however, whether plaintiff had invested part of the proceeds of this sale through him in the purchase of the property in question.

The trial court had an opportunity to see the parties to the action, both of whom testified, and was in a much better position to determine the questions of fact in issue than are we.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

410 - 24763

WALTER S. BRITTON, by Stephen A. Britton, his next friend, Appellee,

vs.

CONSUMERS COMPANY, a corporation, Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

214 I.A. 627

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County in favor of plaintiff for the sum of $6,000.

The declaration, consisting of two counts, charges in substance that the defendant was in possession of and operating an ice house adjacent to a public highway used for travel by pedestrians and vehicles; that along the east side of said highway was a steam railway switch track used by defendant for placing empty cars to be loaded with ice; that this track ran parallel to and about 10 feet west of the west side of the ice house; that the defendant negligently placed on the roof of the ice house barrels for holding water; that such barrels were unfastened and were likely to be blown off by wind storms; that on June 21, 1914, the plaintiff during a severe rain and wind storm attempted to enter an empty box car on said switch track; that while so doing one of the barrels was blown from the roof of the ice house upon the plaintiff, thereby injuring him. The defendant filed pleas of the general issue and non-ownership and control.

At the time of the accident the defendant owned and operated three ice houses in Lake County, Indiana, all of which were situated upon a roadway which extended in a southwesterly direction from a street known as Indianapolis Boulevard, which

runs in a northwesterly and southeasterly direction; these houses are known as No. 1, No. 2 and No. 3, respectively. Ice house No. 2, near which the accident occurred, is situated east of the roadway about a mile southwest of ice house No. 1, which is located about a block south of the intersection of the roadway and Indianapolis Boulevard. Ice house No. 3 is about one-half mile southwest of ice house No. 2. Ice house No. 2 faces in a westerly direction. A railroad track extends southwest from Indianapolis boulevard and east of and adjoining the roadway in question. The defendant owned the land lying to the north, east and south of ice house No. 2. The land west of this ice house was held by the defendant under a lease. Railroad tracks, including the main track and a switch track to the east of it, were built upon this leased land and were used under a right-of-way agreement between defendant and the Indiana Harbor Railroad Company. Under this agreement the defendant and the railroad company have the joint and equal use of the tracks for a period of ninety-nine years. All of the ice houses are located east of the roadway. A glucose factory is located a short distance south of ice house No. 1. The railroad tracks which pass the ice house extend generally in a southwesterly direction to Wolf Lake. The railroad and the ice houses were built by C. B. and E. A. Shedd, who purchased a part of the land referred to in 1880. The property was subsequently leased to the Knickerbocker Ice Company and the Consumers Company. The west rail of the main track which lies west of and parallel to ice house No. 2 is a distance of 22 feet from the front wall of the building.

C. B. Shedd, one of the lessors of the property, testified that E. A. Shedd & Company built the railroad just

before ice house No. 2 was built; that sometime after the railroad was put in "we threw up a ditch on the west side of the track so that we could have a driveway on the west side."

There is some evidence in the record to the effect that sometime after they acquired the property the Shedds fenced in a strip of the land, to which they held title, approximately 64 to 66 feet wide. It was a contested question on the trial whether that part of the strip which was used as a roadway by vehicles and pedestrians had become by use or prescription a public highway.

Charles E. Shedd testified that he did erect fences on certain portions of the land east of the railroad tracks in order to enclose a part of it which was used for pasturage; that the nearest fence west of ice house No. 2 was situated a distance therefrom of about 400 feet.

There was some conflict in the evidence as to the character of the roadway and the uses to which it had been put, and if the case were to be determined on this evidence we would not be disposed to disturb the finding thereon of the jury. The evidence, however, as to the public or private character of that part of the land upon which the tracks were laid down, is, we think, almost conclusive that it had never been set aside for, or used as, a public highway.

The evidence shows that the accident occurred near the northwest corner of ice house No. 2; an empty box car was located upon the switch track which was laid between the main track and the front of the building, the easterly rail of the switch track being about 10 feet from the west wall of the ice house. The plaintiff testified that on the day in question he had been fishing at Wolf Lake, Indiana. He was unable to tell anything

about the circumstances attending the accident. Other witnesses, however, testified that a severe storm arose and that the plaintiff and other persons who were with him started across the roadway to get into the box car which was standing on the switch track, when a barrel fell or was blown from the roof of the ice house and struck the plaintiff as he was about to enter the car at a point between the car and the west wall of ice house No. 2.

Testimony was introduced showing that the roadway was used by pedestrians and vehicles for many years preceding the time of the accident. One witness testified that he never saw any obstruction on the roadway and that he never saw any fence near it indicating private ownership; that the road had not a good road-bed; that it was sandy and filled up with cinders "here and there."

Plaintiff relied in the main upon the testimony of Frank Hech, a civil engineer, in support of his contention that the road was a public highway. This witness testified that the road was well traveled and fenced; that it appeared to have been used for a considerable time by vehicles of various kinds; that it was fenced on both sides for most of the distance and that he had seen horse drawn vehicles, automobiles and foot passengers passing in the roadway. The testimony of this witness was to the effect that there was a large boarding house west of the roadway, southwest of ice house No. 2; that there was no fence on the west side of the roadway "along that stretch opposite ice house No. 2; that there was a residence building opposite ice house No. 1, facing the roadway; that "the travel I have spoken about includes that on the strip of roadway in front and beyond the ice house."

There is no evidence in the record that we can discover tending to show that that part of thestrip of land in front of ice house No. 2 occupied by the railroad tracks was at any time

used as a public highway. The evidence does not disclose that it was fenced in and photographs introduced in evidence satisfactorily show the situation of the roadway west of the tracks. The roadway when built was elevated somewhat above the grade of the land occupied by the railroad tracks.

Concerning that part of the land upon which the railroad tracks were laid down, the practically undisputed evidence is to the effect that it was jointly used by and in the possession of the railroad company and defendant. The evidence does not indicate that this land was ever used for a public highway, and from its character, as shown by photographs in evidence, it is our opinion that the railroad tracks, including the switch track between which and ice house No. 2 the accident occurred, was private property and was in no sense a part of the public highway, even if it be conceded that the traveled way west of and parallel with the main track had by user become such.

The evidence shows that a third track was laid down between the west wall of ice house No. 2 and the switch track. This third track was used for the purpose of operating thereon an apparatus called a "loader." All of the tracks, including what we have called "the main track," which was merely a spur running southwesterly from a main line, were used for the purpose of transporting freight to and from the three ice houses operated by defendant.

The jury were called upon to determine as a principal question whether the accident occurred upon a public highway or upon private property. While it is asserted by the defendant that the declaration was insufficient to charge defendant with any duty toward plaintiff arising from the alleged fact that the plaintiff sustained his injuries while on a public highway, we are inclined to hold that the declaration was sufficient in this respect. The failure of the proof, however, to show that the accident did happen

upon a public highway is conclusive of plaintiff's right to recover against defendant.

It is true, as asserted by plaintiff, that where the public uses land for a period of time prescribed by the statute as a highway, a presumption arises that such user was done with the acquiescence of the owner thereof, and that from the nature of such use, the knowledge of the owner may be inferred from the manner and "frequency of the exercise of the right and the situation of the parties." Thorworth v. Schuts, 269 Ill. 573.

There can be no doubt about the rule applicable to cases where claim is made that a public highway has been established by user or prescription. Law v. Neola Elevator Co., 281 Ill. 143; Phillips v. Leininger, 280 Ill. 133.

The evidence shows that the plaintiff at the time he sustained the injuries he complains of was not upon a public highway; that he had left the highway for the purpose of protection from a severe storm and had entered upon private property. Under the circumstances, the defendant did not owe him the duty of protection, except from wilful and wanton negligence, and no such grounds of recovery are relied upon by plaintiff in his declaration.

In McDermott v. Burke, 256 Ill. 401, the Supreme Court said:

> "It is an unquestioned general rule that the owner or occupier of private grounds is under no obligation to keep them in any particular state or condition to promote the safety of trespassers, intruders, idlers, bare licensees, or those who come upon them without any invitation, either express or implied; and this general rule applies equally to adults and children."

Cunningham v. T. St. L. & W. R. R. Co., 260 Ill. 589; Gibson v. Leonard, 143 Ill. 182; Furtell v. Philadelphia Coal Co., 256 Ill. 110.

The plaintiff was not in the place where the accident happened by either the express or implied invitation of the de-

fendant.

Other questions are raised in the briefs filed by counsel in the case, as to which we are of opinion that no reversible error was committed by the trial court.

The judgment of the trial court will be reversed with a finding of fact.

REVERSED.

410 - 24763 FINDING OF FACT.

We find as an ultimate fact in the case that the plaintiff was not upon a public highway at the time he received the injuries he complains of in his declaration.

290 - 24641

EDWARD NAVRATEL, a minor, by Edward Navratel, his father and next friend,
Appellee,

vs.

CURTIS DOOR & SASH COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

214 I.A. 627

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The declaration of four counts charges that on June 4, 1914, the plaintiff, a minor, while seated on a curb on the west side of Loeffler court in Chicago, had his feet run over and his body bruised by an auto truck owned and operated by appellant and that such injuries were inflicted as the result of the negligence of defendant's servant in charge of and driving the truck.

To the declaration defendant filed a plea of the general issue and a special plea that the truck was not in the service of defendant at the time and place of the accident, and that the driver of the truck was not then in the performance of any duty or service for defendant or in any way under its authority, direction or control. There was a trial before court and jury, which resulted in a verdict and judgment in favor of plaintiff for $2500, and defendant appeals.

In the conclusion to which we have come it will only be necessary to consider the issues as they relate to the special plea of non-operation at the time of the accident to plaintiff.

The declaration averred in each of its counts ownership and operation of the truck by defendant at the time of the accident.

From the evidence we find that defendant on June 4,

1914, owned a warehouse running from Morgan to Sangamon streets in the vicinity of railway tracks between 15th and 16th streets in Chicago; that it owned a motor truck which it used for hauling merchandise; that one of its trucks was loaded with merchandise at its warehouse, to be taken and delivered by its employees in charge of the truck to 50th and Lake streets in Austin, about seven miles distant from defendant's warehouse; that the driver of the truck delivered the merchandise at its destination in Austin at about the noon hour on June 4, 1914, and took his luncheon in the vicinity of the point where the merchandise was delivered; that while it was his duty then to return to defendant's warehouse by the customary route, he departed from such route and drove the truck to his own residence on Loeffler court, Chicago, for a purpose personal to himself and not in any way or manner connected with the business of defendant, his master. After having tarried at his residence a short time and while driving the truck therefrom on his way to defendant's warehouse, he drove the truck against plaintiff, a boy then six years of age. It is not quite clear from the testimony of plaintiff whether he was sitting upon the curb with his feet in the gutter, or was standing in the roadway in Loeffler court.

At the time and place of the accident the driver of defendant's truck was not engaged in and about defendant's business and was not working at the errand upon which defendant had sent him, but was calling at his place of residence for the purpose of informing his wife that he would be able to keep an evening engagement which he had previously made with her. Under these circumstances it cannot be said that the truck was being operated by defendant at the time it ran against plaintiff. The truck was not then being operated in the course of the driver's employment or in the business of defendant; it therefore follows that defendant is not liable in an action for damages resulting from the driver's negligence.

The instant case on the phase now being discussed

and upon which our decision rests is analogous both in law and fact to the situation of the parties in Szszatowski v. Peoples G. L. & C. Co., 209 Ill. App. 460, in which a petition for further review by certiorari was denied by the Supreme court.

We refrain from further discussion, but rest content with referring to the Szszatkowski case supra for the reasons and authority upon which we base the conclusion at which we have arrived in this case.

The judgment of the Superior court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

290 - 24641 FINDING OF FACT.

The court finds as an ultimate fact that the defendant did not operate or manage the auto truck in question at the time of the accident and injury to plaintiff set out in the declaration and each count thereof.

6 - 23703

(467)

JAMES S. O'BRIEN et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

and

ASH-MADDEN-RAE COMPANY et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

In the matter of the contempt of BESSIE BERMBAUM,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

214 I.A. 627

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Bessie Bermbaum is charged with having violated the injunctions by going to the home of Ray Aprill, an employe, and assaulting her for the purpose of intimidating her into leaving the employment of one of the complainants. That appellant did visit the home of Ray Aprill is conceded, but there is no evidence that she had any knowledge that this act amounted to a violation of the injunctions. She says she does not understand either the English or the Polish language. Doubtless she understood from speeches that some kind of an injunctional order relative to the strike situation had been entered, but there is no evidence whatever that she had knowledge of any inhibition

of calling at the home of Ray Aprill or any of her other friends.

The testimony of the alleged assault is in hopeless conflict. Upon the occasion of the call some six or eight other girls came with appellant to see and talk with the Aprill girl. She says that appellant threw dishes at her, also that the other girls threw dishes. The landlady, who was in the room, testified that she did not see who threw or broke the dishes. Her description of the squabble among the girls was that "they were licking each other." Appellant testifies that on the occasion in question she called on Ray Aprill for the purpose of talking to her in a friendly manner; that she did not ask her to stop work, nor throw dishes at her; that Ray had been her friend for two years, and that when she had missed her at the union meetings she went to find out what the matter was.

The conclusion of the court was that appellant was guilty of contempt, and she was committed to imprisonment in the County jail for a term of sixty days.

A majority of this court is of the opinion that in this conflict of testimony it cannot be said it was satisfactorily established that appellant committed the assault claimed. In the absence of evidence corroborating the testimony of Ray Aprill, and in view of the definite denial by appellant, the finding that she was guilty cannot stand. The judgment of the court is therefore reversed.

REVERSED.

Mr. Justice Holdom dissents.

[illegible]

9 - 23707

JAMES S. O'BRIEN et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

and

ASH-MADDEN-RAE COMPANY et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

In the matter of the contempt of LIZZIE DORFMAN,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

214 I.A. 627

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Lizzie Dorfman is charged with picketing and with having assaulted a police officer. The court found her guilty and sentenced her to a term of ten days in jail. A police officer testified that on a Mary Doe warrant he attempted to arrest appellant, as directed by one of the complainants. The officer said she was not doing anything at the time. There was testimony that when the police officer attempted to arrest her she resisted, and the officer says she stabbed him with a hatpin. Other officers present did not see the alleged stabbing, and it is denied categorically by appellant. She testified that she always wore a cap, without any hatpin, and that she had no pin

at the time of the alleged assault. The most that can be deduced from the testimony is that appellant was upon the street, where she said she supposed she had a right to be and that peaceful picketing was not forbidden; that when one of the complainants asked the officer to arrest her, she was doing nothing at the time so far as the officer knew; that there were some scrimmages between the officers and a number of the girls, during which one of the officers was jabbed with a hatpin, but by whom is uncertain. In view of the emphatic denial by appellant, and the lack of evidence in this regard, we hold that the charge of assault upon the officer was not sustained.

The punishment by imprisonment was evidently imposed by the court upon the assumption that appellant was guilty of assault. As we hold that such guilt was not established, it would follow that the penalty should also be set aside. For the reasons indicated the judgment of the Circuit Court will be reversed.

REVERSED.

Mr. Justice Holdom dissents.

at the time of the military mission. The plan that was be adopted from the beginning in that unfortunate and lamed the effects, where one could not successfully give and a right to be not been immediately investing one not instructions. Each other one of the commandants behind the writing in internal art, all was during practical at the start of for the military which that first very some unfamiliar between the efficient and a number of the little. Also that which one of the efficiency and based view - mission, had by what is necessary. In view of the economic basis in Kuwait, and the lack of assistance in this project, the area lies the change of already upon the effort was not achieved.

The availability of individuals was efficiently lessened by the point when the assumption that material was quality of manner. As we have this and still was not relinquished. It seems fitting that the jewelry would also be not using. The the reason indicated the judgment of the Tender Board will be effective.

Sincerely,

Ed. Jewelry Grand Commerce.

10 - 23708

JAMES S. O'BRIEN et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

and

ASH-MADDEN-RAE COMPANY et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

In the matter of the contempt of EDNA KUNIN,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

214 I.A. 628

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Edna Kunin was an employe of one of the complainants. She went out on strike on February 15th, and in a petition filed February 28th she was charged with having violated the injunctional orders by picketing, calling a certain employe "scab," and assaulting one Rose Egav, an employe. The court adjudged her guilty of contempt and sentenced her to imprisonment in jail for fifteen days.

There was testimony tending to show that on February 21st, as Rose Egav was returning from work, appellant called her and another girl "scabs," and kicked Rose Egav. Appellant's version was that she made the alleged remark concerning one of the girls, but that this was made to a friend with whom she was walking,

and was not intended to be heard by anyone else. Her testimony is supported by that of the friend, and together they deny that appellant kicked one of the girls. There is evidence, however, of some altercation among the girls, but it is very indefinite as to who were the aggressors. There is some evidence that appellant was picketing, but this seems to have been at a time before the injunctions were issued. We think the court was influenced by evidence concerning general acts of picketing, intimidation and violence, committed on February 15th and 16th. Such conduct on the part of appellant, even if proven, could not be considered as violating the injunctions of February 17th.

We hold that the evidence is insufficient to sustain the charge that appellant called other employes opprobrious epithets, such as "scabs," or was the aggressor in any assaulting. The judgment of the Circuit court will therefore be reversed.

REVERSED.

Mr. Justice Holdom dissents.

11 - 23709

JAMES S. O'BRIEN et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

and

ASH-MADDEN-RAE COMPANY et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

In the matter of the contempt of LIZZIE WEXLER,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

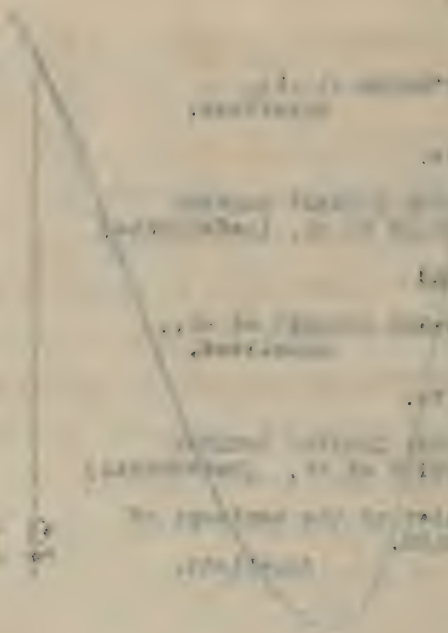
214 I.A. 628

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Appellant Lizzie Wexler with others went on strike February 15th. She was called the "First Lieutenant" of Seidman. In the petition filed on February 21st she was charged with having advised picketing and, in general, directing the picketing activities of the girls, in violation of the injunctions. The court found her guilty of contempt and sentenced her to thirty days in jail.

The evidence tends to show that appellant was chairman at the strike meeting on February 20th, at which appellant Seidman spoke. She seems to have had supervision over the striking girls. On this evening she told them that they



should picket in pairs; that they should act peacefully and without violence, or, as one witness said, they were "to conduct themselves nicely." Appellant admits that she did say to the striking girls that they might talk quietly and decently to former shop-mates about joining the strike, while at the same time cautioning them not to approach anyone in greater numbers than two. Such conduct was beyond any doubt in violation of the terms of the injunctions. It is a fair inference, however, that appellant believed it would be lawful for the strikers to conduct themselves in the manner she directed.

The only question, therefore, for our consideration is whether appellant should be punished by imprisonment for thirty days, when her endeavor in the matter was to have the girls conduct themselves in an orderly and peaceful manner. A majority of the court is of the opinion that while the infliction of a fine might have been justified, under the circumstances punishment by imprisonment is excessive. The impression made by the evidence is that her motives were for peaceful and orderly conduct, and we hold that this disposition should have great weight in fixing the penalty. We cannot agree with the chancellor that her actions deserved the penalty of imprisonment, and therefore the order of commitment will be reversed.

REVERSED.

Mr. Justice Holdom dissents.

13 - 23711

JAMES S. O'BRIEN et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) and ASH-MADDEN-RAE COMPANY et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) In the matter of the contempt of SAM HANDLEMAN, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 628

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Appellant Sam Handleman was charged with being implicated with Sam Schuester in the assault on Pefferman, referred to in our opinion in the Schuester case, No. 23710. Upon hearing, Handleman was adjudged in contempt and sentenced to a term of five months in jail and to pay a fine of $100.

We have already narrated the occurrence in our opinion in the Schuester case, and it is unnecessary to repeat it here. The points made in that case are also made with reference to Handleman, and what we have said in considering them is applicable and controlling in this case.

There is some question raised as to the identification of Handleman, but Pefferman, who knew both Schuester and Handleman, testified as to the presence and assault of Handleman jointly with Schuester, and this testimony is not contradicted. Handleman did not contradict the charge that he knew of the injunction. The evidence shows that he was seen at union meetings where it was discussed, and in view of all of the circumstances, including the conversation with Pefferman immediately prior to the assault, there remains no room for doubt that Handleman as well as Schuester was fully informed, and that the purpose of both of them was by intimidation and brutal violence to force Pefferman to cease working.

The finding that Handleman was guilty of contempt is fully justified from the evidence, and the seriousness of his offense deserves the sentence of punishment which he received. The judgment is affirmed.

AFFIRMED.

14 - 23712

JAMES S. O'BRIEN et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) and ASH-MADDEN-RAE COMPANY et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) In the matter of the contempt of LIZZIE ZIELKE, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 628

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Appellant Lizzie Zielke was another garment worker who went on strike February 15th. She received by mail a copy of the injunction issued on February 17th. Subsequently, on March 26, 1917, her employer, Lee Schwartz, filed a petition charging her and other girls with violation of the injunction. She was found guilty of contempt and sentenced to imprisonment for thirty days in the Cook County jail.

The evidence tends to show that during the period of the strike there was much noisy talk between the striking girls and those remaining at work. Names were called, but by whom the confused testimony makes it almost impossible to determine with certainty. Appellant Lizzie Zielke denies

positively any acts of violence, although she does admit that she took some part in the interchange of talk between the girls. Of course this is highly probable, as the evidence shows that there was a large number of illiterate girls, speaking a foreign language and of more or less excitable disposition, who were meeting upon the streets and naturally talking about the situation. There is no convincing evidence that appellant committed any acts which would call for the imposition of a jail sentence.

The evidence shows beyond question that appellant was a participant in peaceful picketing, and to that extent was in disobedience of the injunction.

There is a feature in this case applicable also to the cases of three other girls, appellants. As we have said, these girls were employed by Lee Schwartz. Upon receiving copies of the injunctional order secured at his instance, they, being uneducated and not informed as to its purport and meaning, inquired of Schwartz as to what they should do. He told them that the injunction was not meant for them and that they should pay no attention to it and should forthwith burn it. It is evident that Schwartz was extremely anxious to have the girls go back to work, and was trying to conceal from them that any restraining order had been obtained by him. He did not post copies of the injunction in any conspicuous place in his premises, but posted only one, in a window some distance from the street and facing on an alley. It is clear that he was attempting to maintain friendly relations with his employes, including appellant, and to this end was not only willing to have them believe that the injunctional order did not apply to them, but directly so informed them. There is good reason to believe that his desire was to use the injunctional order only as an instrument to compel the employes to return to him.

We hold that this is a case for the application of the principle stated in Cyc, vol. 9, page 25, that "where the contempt charged is the result of the advice or consent, direct or implied, of complainant, this is a sufficient justification." Cases applying this principle are Holcombe v. Dupree, 50 Ga. 335; Matter of Arkenburgh, 15 Misc. (N. Y.) 416; Com. v. Ward, 5 Pa. Co. Ct. 479; Jones v. Mayrant, Harp. Eq. (S. C.) 180. Schwartz having for his own interest misled appellant into believing that peaceful picketing was not forbidden to her, he is in no position in equity to seek to have her punished for this. Under such circumstances the judgment of the Circuit Court should not stand, and it is reversed.

REVERSED.

Mr. Justice Holdom dissents.

15 - 23713

JAMES S. O'BRIEN et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

and

ASH-MADDEN-RAE COMPANY et al.,
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants)

In the matter of the contempt of FRANCES SCHMIDT,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

214 I.A. 629

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Appellant Frances Schmidt was one of the three girls referred to in the case of Lizzie Zielke, No. 23712, opinion this day filed. She was found guilty of contempt and sentenced to twenty days' imprisonment in the County jail. What is said in the Zielke case as to the conduct of the girls is applicable to this case. There is no convincing evidence that Frances Schmidt was guilty of any assault or violent conduct. She denies that she indulged in any vile names or threatening talk, as charged, although it is true that she was on the streets and may or may not have been picketing.

What we have said in our opinion in case No. 23712 concerning the conduct of Lee Schwartz is applicable here. Nothing

serious was proven against appellant, and if it could be said that she disobeyed the injunction by picketing, she was misled thereto by her employer, Schwartz, at whose instance she was found in contempt. The judgment against her cannot stand and it is reversed.

REVERSED.

Mr. Justice Holdom dissents.

16 - 23714

JAMES S. O'BRIEN et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) and ASH-MADDEN-RAE COMPANY et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) In the matter of the contempt of MARY LEVIN, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 629

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Mary Levin, appellant, is one of the three girls referred to in our opinion in No. 23712, the Zielke case. She was found guilty and sentenced to a term of twenty days in jail. There is no evidence of any serious unlawful conduct on her part. She was one of a group of girls, all of whom were indulging in a good deal of wrangling and talking. She denies some of the more flagrant things charged. It is clear that in the confusion it would be almost impossible to determine definitely which particular person said any particular thing or did any particular act.

Picketing of the Schwartz place is admitted, but his conduct with reference to the injunction, and his advice to ap-

pellant, should prevent his seeking the aid of the court to punish her. What we have said on this point in our opinion in No. 23712 is applicable here. These reasons must control. The judgment against appellant is therefore reversed.

REVERSED.

Mr. Justice Holdom dissents.

17 - 23715

JAMES S. O'BRIEN et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) and ASH-MADDEN-BAR COMPANY et al., Appellees, vs. INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al. (Defendants) In the matter of the contempt of ROSE BLANK, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 629

MR. JUSTICE MOSURELY DELIVERED THE OPINION OF THE COURT.

This one of the contempt cases which we have referred to in our opinion this day filed in case No. 23705. What we there said as to the circumstances and the legal propositions involved, applies to the case of this appellant and is adopted as part of this opinion.

Appellant Rose Blank is one of the three girls referred to in our opinion in the Zielke case, No. 23712. She was adjudged guilty and sentenced to a term of twenty days in jail. What we have said in our opinion in the Zielke case is applicable in every particular to the case of Rose Blank. She was guilty of no violent conduct, and the most that is charged is some threatening talk. This is denied by her, and she is corroborated on this point by other witnesses. As we have said with reference to those other cases, the evidence shows that there was present on the street a group of excited, illiterate girls of foreign extraction,

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not speaking the English language, and of various opinions as to the strike situation. Such persons would naturally indulge in excitable and noisy talk, general in its nature and participated in by everybody. We do not think that appellant should be punished by imprisonment for not remaining silent. She was probably picketing, and in this respect disobedient of the injunction. She was one of those whom Schwartz had advised to disregard the injunction as it did not apply to her. The reasons given in our opinion in case No. 23712 as to the effect of the attitude of Schwartz control our conclusion here.

The judgment of the Circuit Court is reversed.

REVERSED.

Mr. Justice Holdom dissents.

362 - 24714

ELIZABETH J. MOLLAN,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY, and CALUMET & SOUTH CHICAGO RAILWAY COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

214 I.A. 629

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff received injuries through a collision between an automobile, in which she was riding, and a street car of the defendants. She brought suit, fixing the ad damnum at $5,000, which upon the trial was increased to $10,000. She had a verdict for $5,000, upon which judgment was entered; defendants asktthat this be reversed.

The accident happened about nine p. m. on April 12, 1916, on a clear evening, when the moon was nearly full and illuminating the surroundings. The persons in the automobile were a Mr. Berry, driving the machine, and in the rear seat his wife, who died before this case was tried, and his mother, Mrs. Mollan, the plaintiff. They were going west on 93rd street, an east and west street in Chicago, and were looking for a northbound paved street upon which they could proceed. Berry was not familiar with the neighborhood, for after passing Chappel avenue, a north and south street, he seems to have been of the opinion that he was going in the wrong direction, and started to turn around. On 93rd street are two street car tracks; the northerly carries the westbound street cars. Berry started his automobile towards the left, and when it was upon the westbound track, headed somewhat towards the southwest, his engine "died." While thus stalled on the track the automobile was struck by a westbound street car.

The evidence tends to show that there was sufficient light for the motorman to see the automobile when a block away. The contested point concerns the distance the street car was from the automobile when the latter became stalled upon the track. Plaintiff's version is that the street car was something more than a block away. This would give ample time for the motorman to see the stalled auto and to stop without striking it. Defendants' version is that the automobile was proceeding westward on 93rd street, north of the westbound track, and when the street car was about 25 feet away, it suddenly turned to the left across the track, where it stalled; that although the street car was going slowly and under control, it was too near to be stopped in time to avoid a slight collision. Plaintiff's version is supported by five other witnesses, four of them disinterested. Their stories, while not entirely consistent in all details, tend to support plaintiff. Defendants' version is supported by the testimony of the motorman, and only partially by one other witness, who did not see all of the occurrence. In this condition of the record the jury could properly find that the defendants were guilty of the negligence charged in the declaration; indeed the preponderance of the testimony is so greatly with the plaintiff that no other conclusion could reasonably follow.

It is said that plaintiff was guilty of contributory negligence, in that although she saw the approaching street car some distance away and in ample time for her to alight from the automobile before the collision, she did not do so. This question properly was left to the jury. It cannot be said that plaintiff was guilty of contributory negligence as a matter of law, and the jury reasonably could find that she was in the exercise of due

care for her own safety, as a matter of fact. The evidence shows that both she and her daughter-in-law, Mrs. Berry, signaled with their handkerchiefs to the motorman of the approaching car, and could reasonably assume that their signals would be seen in the bright moonlight. It also appears that Berry was in his seat in front, attempting by the use of his self-starter and gears to start the automobile. It might move out of the danger line at any instant, and for plaintiff to have attempted to alight at this time might have exposed her to the risk of being thrown by its sudden starting. Under such circumstances we see no reason to disagree with the opinion of the jury that plaintiff was not guilty of contributory negligence.

The case of Lawrence v. Fitchburg & L. St. Ry. Co., 201 Mass. 489, cited by defendants, is distinguishable from the instant case in that there the plaintiffs relied solely upon the unjustifiable expectation that the motorman would see their automobile, although it was a dark night.

The emphasis of the defendants in their briefs before us is upon the alleged misconduct of plaintiff's counsel. In the cross-examination of plaintiff's witnesses the attorney for the defendants, in testing their recollection of the occurrence, led them to make statements indicating that in their opinion the accident happened on a dark night. It subsequently developed by the testimony of Mr. Cox, in charge of the weather bureau here, that it was a bright, moonlight evening, and that this fact was known to the attorney for the defendants while cross-examining plaintiff's witnesses. In his argument to the jury the attorney for the plaintiff denounced this conduct of the attorney for the defendants in extremely violent language. His remarks were too extended for much quotation. Defendants' attorney was characterized as "a man guilty of a trick like that, a dishonest trick. * *

I tell you he has not been honest in this case, plain, common honesty. He has been tricky, tricky and dishonest. * * What is the use of a man like that, who stands here convicted of doing things that were not fair, tricky, what is the use of his talking about being honest? He don't know what it means, if we may judge by his conduct in the trial of this case. * * He has not been fair, and he is not fair, and he don't know what common fair play and honest fair dealing means." There was much more of the same kind of talk. It was a violent attack upon the honor and honesty of the opposing attorney. We have no hesitation in holding that such an attack was wholly uncalled for and unwarranted. The attorney for the defendants, in testing the recollection of the witnesses as to the fact of the evening of the occurrence being dark or otherwise, was only exercising the ordinary tactics of the lawyer upon a trial. Such tactics are in daily use, and wholly permissible. Similar in kind were the methods of Abraham Lincoln in the celebrated Armstrong murder case, where Mr. Lincoln on cross-examination led the prosecuting witness to describe how by the light of the moon he had seen the murder committed and was able to identify the assailant, although Mr. Lincoln knew all the time that it was dark, because the moon had not yet risen. We cannot avoid the conclusion that counsel for plaintiff, with his large experience, well knew that the conduct of the opposing attorney in this regard was entirely proper, and adopted the tactics of denouncing him solely to counteract any harm to plaintiff's case which might have been done by the cross-examination of her witnesses. If this were a close case as to liability we should be of the opinion that the verdict was improperly induced by the attack upon defendants' attorney. However, we are of the opinion that the evidence so largely preponderates for the plaintiff that no other verdict as to liability could be expected, and that the

argument of counsel had little affect in this respect.

There is, however, a sharp conflict as to plaintiff's injuries, both as to their cause and extent. It was plaintiff's version that she was thrown or "catapulted through the air" out of her seat, falling "on her head, right on the pavement." The opposing version is that she did not leave the automobile, and that the only injuries she received were on the cheek, where she was struck by the broken ribs of the top of the auto. After considering the variant stories of the witnesses we are of the opinion that the greater weight of the evidence does not support plaintiff's version. Her injuries were a cut and bruise on the left cheek, and a cut on the eyelid. This resulted in temporary swelling and pain, but after treatment the wounds seemed to heal, leaving on the cheek a very faint scar; plaintiff herself describes it as "very, very faint." There is a scar between the eyelid and the eyebrow. In all probability if plaintiff had been pitched out of the automobile upon her head she would have suffered much more serious injuries than are present. It is much more reasonable to believe that the cuts on her face came from the strokes of the broken slats of the top of the automobile.

The extent of the injuries is very doubtful. In addition to the cuts, it is claimed that plaintiff is suffering from a paralysis on the left side of her face, which a doctor, testifying as an expert, ascribes to a degeneration of the left facial nerve; that this has caused a dropping of this side of the face. The doctor testified that for a blow to produce this result it would have to be along the course of the nerve and on the whole left side of the face. The scar on the cheek is not over the nerve, and there is no clear evidence of such a blow to the cheek as to produce the degeneration of the facial nerve which is said to be present. The doctor further testified

that this condition could be the result of infection. Plaintiff was a sufferer from rheumatism before the accident, and was still so afflicted at the time of the trial. That nerve degeneration or paralysis of the face was caused by infection, and not by the injuries received in the accident, is more reasonably consistent with the evidence.

The jury returned a verdict of $5,000, which was the full amount of the original ad damnum. We are of the opinion that this amount is excessive, and that the jury was moved thereto by the violent attack in argument upon the attorney for the defendants, above referred to. This speech virtually called upon the jury to punish defendants' attorney for his alleged wickedness, and the large verdict was probably the response. Under these circumstances we are not satisfied to allow the judgment to stand. $2,000 would be ample compensation for plaintiff. If therefore plaintiff shall file a remittitur in this court of $3,000 within fifteen days from this date the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

437 - 24790

JULIUS BUSHKIN,
Appellant,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

214 I.A. 630

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries the jury returned a finding of not guilty, upon which judgment was entered; plaintiff by this appeal seeks its reversal.

The first count of the declaration averred in substance that the defendants were engaged in the business of common carriers of passengers for hire and were operating a certain street car, and that plaintiff was a passenger on such car, using all due care and caution for his own safety, but that the defendants, disregarding their duty to plaintiff, so carelessly and negligently operated and managed the car that as a direct result thereof plaintiff was thrown from the car to the ground, thereby sustaining the injuries complained of. An additional count, the only one other than the above which remained in the case upon rendition of the verdict, alleged that defendants were in control and management of certain street cars for the conveyance of passengers for hire and reward, and that while plaintiff, in the exercise of ordinary care, was boarding one of such cars it was suddenly started forward, causing plaintiff to be thrown down to and upon the street and severely injured.

As grounds for reversal it is argued that the court erroneously instructed the jury, and that the verdict was against the manifest weight of the evidence.

The accident occurred on the 12th street line, at or near its intersection with Laflin street. The car in question was westbound. Plaintiff, at the time of the accident 49 years of age, attempted to show that when the car reached Laflin street it was brought to a stop; that two passengers preceded him in boarding the car, and that while he had one foot on the step and was about to place the other on the platform, having hold with his left hand of the upright handhold at the rear end of the car, the car suddenly started forward, throwing plaintiff off backwards so that he fell to the street and was injured.

Three witnesses besides himself testified for the plaintiff. The defendants' version was testified to by one witness other than the conductor in charge of the car, and was calculated to prove that no such occurrence as plaintiff claimed took place; that, as a matter of fact, after the car started from Laflin street, plaintiff came running from behind the car and grasped the rear hand-bar, but the car having then attained a speed of about nine miles an hour, he did not succeed in boarding it but instead was thrown to the ground and thus sustained his injuries.

We shall not attempt to detail the evidence on either side. We have examined it carefully, and while the number of witnesses appearing for the plaintiff exceeded those who testified for the defendants, the jury was fairly justified in concluding that the proof offered by defendants was the more straightforward and convincing. As has often been stated, a reviewing court, guided only by the printed record, is in a position nowise equal to that of the jury in passing upon the character of the evidence and the credibility of the witnesses. On this record we are unable to say that the verdict was against the manifest weight of the evidence.

The counts upon which the trial was had base the right to recovery upon the allegation, or its equivalent, that plaintiff was a passenger upon defendants' car, and that there had been established between the parties the legal relation of carrier and passenger; hence that defendants owed plaintiff the highest degree of care to avoid injuring him. Plaintiff's given instruction No. 4 submitted to the jury the question whether at the time of the accident plaintiff was a passenger. Counsel here object to the giving of defendants' instruction No. 3, also concerning the relationship of carrier and passenger, contending that by it there was put up to the jury a question entirely foreign to anything in the case. There might be applied to this argument the rule that one party cannot complain of the other's instruction, when his own is open to the same criticism. Harney v. Sanitary District, 260 Ill. 54. We do not, however, consider the objection well founded, either in the respect mentioned or as having submitted a question of law to the jury. It was not error to instruct the jury that "a person does not become a passenger until he has put himself in charge of the carrier and has been expressly or impliedly received as such by the carrier." O'Donnell v. C. & N. W. Ry. Co., 106 Ill. App. 287.

The giving of or refusal to give other instructions is relied on for reversal, but examination of the court's action in this regard does not disclose any error sufficiently prejudicial to warrant disturbing the judgment.

Our opinion is that a fair trial was had, and a different result could reasonably be expected from a
For the reasons stated the judgment is affirmed.

(478a)

392 - 23737

EUGENE QUINN, by Lottie Quinn, his mother and next friend,

Appellee,

vs.

CITY OF CHICAGO, ANNA E. JORDON, B. A. SPEER, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK et al.,

CITY OF CHICAGO,

Appellant.

Appeal from Superior Court, Cook County.

214 I.A. 630

MR. PRESIDING JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for $3,500.00 in favor of appellee, plaintiff below, for injuries alleged to have been sustained through the negligence of appellant, the City of Chicago, hereinafter referred to as the defendant.

Originally there were three defendants, but before verdict the cause was dismissed as to all but the City of Chicago.

The accident complained of occurred at the northeast corner of 79th street and Normal avenue, - both public thoroughfares in the City of Chicago. This corner is occupied by a building facing south on 79th street. On the west side thereof there was an open stairway in the sidewalk on Normal avenue, leading into the basement of the building, about seven feet below. This stairway was enclosed on the west and south sides by an iron fence consisting of two rails, supported by iron posts, the entrance thereto being at the north end of the areaway. The sidewalk on Normal avenue was of cement, except that portion occupied by the said iron fence, which was wooden, and to which the posts supporting said fence were fastened.

[illegible]

[illegible]

[illegible]

On the evening of August 8, 1912, the said fence gave way, causing plaintiff to fall into said areaway, thereby sustaining the injuries complained of.

The evidence shows that said areaway and stairway had existed for upwards of six years, and that said fence had been in an unsafe and dilapidated condition for several years prior to the time of said accident.

The negligence charged against defendant was the wrongful and negligent permitting of the construction and maintenance of said areaway and stairway in and on the public sidewalk on Normal avenue, which was known to be dangerous by the defendant; also defendant's failure to enforce one of its ordinances which prohibited such obstructions in public sidewalks.

It is contended that the notice served upon defendant was not in compliance with the statute. Said notice was as follows:

"To the City of Chicago:

"You are hereby notified that Eugene Quinn, residing at 657 West 81st street, Chicago, sustained personal injuries on August 8, 1912, at about 9:15 P. M., by falling in an areaway which is on the public sidewalk on the east side of Normal avenue, just north of 79th street, Chicago, commencing at about five feet ten inches north of the building line on the north side of 79th street, and running about 11 feet north at the building line on the east side of Normal avenue, and running about three feet two inches west of said building line. The depth of said areaway is about ten feet.

"Dr. F. A. Lofton, residing at 6425 Stewart avenue, office at 449 west 63rd street, Chicago, is the attending physician."

The statute relating thereto (sec. 7, ch. 70, Hurd's R. S. of Ill.) requires that the notice contain; (1) the name of the person to whom such cause of action has accrued, (2) the name and residence of the person injured, (3) the date and about the hour of the accident, (4) the place or location where such accident occurred, and (5) the name and address of the attending physician.

On the evening of August 2, 1923, the said Fonzo gave me, causing plaintiff to fall into said runway, thereby sustaining the injuries complained of.

The evidence shows that said runway was slippery but against the property of its owner, the City, it must first be shown that it was negligent and significant evidence for several years prior to the time of said accident.

The negligence charged against defendant was the wrongful and negligent construction of the runway and maintenance of said runway and slippery in and on the public sidewalk on Tremont street, which was issued to be constructed by the defendant; also defendant's failure to replace one of the sidewalkers which prohibited such observations in public sidewalks.

It is contended that the maintenance runway upon defendant's lot is contributed with the statute. Said section was as follows:

"To the City of Chicago.

"The new bungalow building in a regular lot, residing at 6127 Indiana avenue, Chicago, Illinois, property belonging to Michael G. Ellis, we about 113 ft. 7 in. by feet in an already which is on the public alleyway on the east side of Indiana avenue, that south of 7700 avenue, Chicago, commencing at about five feet from the lower south of the building, line on the north side of 7700 avenue, and running north 13 feet north on the building line on the east side of Indiana avenue, and running about 113 feet from the building line. The depth of said runway is about ten feet.

"Mr. T. H. Lafferty, residing at 6127 Indiana avenue, giving as his bona fide address, Chicago, in the aforesaid jurisdiction."

The statute relating thereto (Sec. 7, ch. 7), Smith's S. C. at [2.] requires that the notice contain: (1) the name of the person to whom such order of notice has accrued, (2) the name and residence of the person injured, (3) the place or locality where such injury occurred, (4) the place or locality where such accident occurred, and (5) the cause and nature of

It is argued that said notice fails to set forth the name of the person to whom the cause of action accrued; and that it does not correctly state the place of residence of the injured person.

The said notice named the injured person who in fact brought the action by his next friend. Plaintiff, having informed defendant in said notice that he was injured at the time, place and in the manner specified, substantially complied with the requirements of the statute, and in our opinion his failure to state that a cause of action had accrued to him (a mere legal conclusion) was unnecessary. The mere fact that the notice failed to set forth that a cause of action might also have accrued to his parents for loss of time and services during his minority, is immaterial in the instant case.

Plaintiff testified on direct examination that at the time the said notice was served upon defendant he resided at No. 657 west 81st street, which was an apartment building having but one entrance, and bearing the numbers, 653, 655 and 657; that shortly after said notice was served upon defendant he changed his place of residence. On cross examination plaintiff was asked whether or not he had lived at No. 653, to which he answered in the affirmative.

In our opinion, the foregoing fails to show a fatal variance between plaintiff's place of residence as indicated in said notice, and the proof,

It is also contended by defendant that the verdict is clearly and manifestly against the weight of the evidence.

That the plaintiff was injured while either leaning against or sitting upon the iron railing or fence in question, and that said railing or fence was, and for a number of years prior to the time of the accident had been in an unsafe condition, is clearly established by the evidence. Whether or not plaintiff

It is argued that said section fails to put forth the cause of the process in which the cause of action accrued; and that it does not necessarily state the place of residence of the injured person.

The said section based the Supreme court on in fact brought the action by its own friend. Plaintiff, having informed defendant in said letter that damages injured at the time, place and in the manner specified, unreasonably stating the circumstances of the accident, and in our opinion his failure to state that a cause of action had accrued to him (a mere legal conclusion) was immaterial. The mere fact that the petition failed to set forth that a cause of action had been accrued to the plaintiff for lack of time and evidence during his minority, is immaterial in the instant case.

Plaintiff testified on direct examination that at the time the said petition was started that it could be proved as he, at that time stated, which was an instrument building matter but not material, but failing the evidence, did not deny that this minority after said petition was started upon defendant in changing the place of residence. In other words plaintiff was asked whether or not he had lived at Ft. Worth, in which he answered in the affirmative.

In our opinion, the foregoing rule is when a final verdict between plaintiff's place of residence is immaterial in said action, and the proof,

It is also contended by defendant that the trial is clearly not materially against the weight of the evidence.

That the plaintiff was injured while either leaning against or sitting upon the line trailing or fence in question, and that said building of Fort was, and for a number of years prior to the time of the accident had been in an unsafe condition.

knew or in the exercise of ordinary care should have known of its dangerous condition or whether or not he was negligent in either leaning against or sitting upon same, were, under the circumstances as shown by the record before us, questions of fact for the jury; and because of the conflicting nature of the evidence we are not disposed to disturb their finding thereon.

Errors have also been assigned upon the giving of instructions Nos. 7 and 8 on behalf of plaintiff. The instructions complained of told the jury, among other things, that if they found from a preponderance of the evidence that there was in effect a city ordinance at the time of the accident which prohibited the construction or maintenance of such obstructions or openings in public sidewalks as the one shown to have existed in the case at bar, then it was defendant's duty to exercise reasonable diligence to enforce such ordinance, and that a failure to do so would render it liable to plaintiff for the injuries complained of, if received while in the exercise of due care for his own safety.

It is argued by defendant that inasmuch as the enforcement of its ordinances is a governmental function, it cannot be held liable for damages resulting from its failure so to do.

While it may be conceded as a general rule that the defendant cannot be held liable for damages resulting from its failure to enforce its ordinances, still the ones incorporated in the instructions under consideration were merely declaratory of defendant's statutory obligation to exercise reasonable care to keep and maintain its streets in a reasonably safe condition and state of repair, free from obstructions constituting nuisances. The maintenance of the areaway and stairway in question, in our opinion, amounted to an obstruction to a

than or in the matrix of military sure should have known of its dangerous condition or whether or not he was negligent in either issuing orders or taking upon some, were, under the circumstances as shown by the record before us, questions of fact for the jury; and because of the conflicting nature of the evidence we are not disposed to disturb their finding thereon.

Errors have also been assigned upon the giving of instructions Nos. 7 and 8 on behalf of plaintiff. The instructions complained of told the jury, among other things, that if they found from a preponderance of the evidence that there was in effect a city ordinance at the time of the incident which prohibited the construction or maintenance of such structures or openings in public sidewalks as the one shown to have existed in the case at bar, then it was mandatory on the defendants reasonable diligence to secure such ordinance, and that a failure to do so would render it liable to plaintiff for the injuries complained of, if received while in the exercise of due care for his own safety.

It is argued by defendant that inasmuch as the enforcement of the ordinance is a governmental function, it cannot be held liable for damages resulting from its failure so to do.

While it may be conceded in a general sense that the defendant cannot be held liable for damages resulting from its failure to enforce its ordinance, still the construction placed in the instructions under consideration were merely declaratory of defendant's statutory obligation to operate passenger cars to keep and maintain its streets in a reasonably safe condition and free of danger, from dangerous conditions existing thereon. The maintenance of the roadway and sidewalk in question, in our opinion, amounted to an obstruction in a

public street, constituting a nuisance or purpresture, which the defendant, in the exercise of reasonable care should have abated (People v. Harris, 203 Ill. 272), and having failed therein, it also became in legal effect, guilty of maintaining said nuisance. (Wheeler v. City of Ft. Dodge, 131 Ia. 566) In our opinion, therefore, the said instructions were proper.

Other errors have been assigned which, however, we shall not discuss save to say that in our opinion they are not of sufficient moment to warrant disturbing the judgment.

From a careful examination of the entire record, we conclude that the judgment must be affirmed.

AFFIRMED.

36 - 24067

SAM FELDMAN and IGNATZ ENGEL,
Defendants in Error,

vs.

GEORGE J. DREISKE,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

214 I.A. 630

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Defendant brings this writ of error to reverse a judgment for $100.00 against him, being the amount deposited with him by plaintiff as earnest money on a contract for the purchase of certain real estate from one Dettler.

By the terms of the said agreement, the said Dettler covenanted, among other things, to convey to plaintiffs by warranty deed, free and clear of all incumbrances, the premises therein described.

The evidence shows that the premises in question were improved with a brick building which was constructed in such a manner that the west wall of an adjoining building was used as its east wall; that the said wall was entirely on the adjoining lot; that for a valuable consideration permission had been given orally to so use the said west wall of the said adjoining building; that there was no obligation on the part of the said Dettler or prior owners of the said property to maintain or repair the said wall.

The trial court held that the aforesaid arrangement constituted an incumbrance upon the property sold by the said Dettler, and that hence plaintiffs were entitled to the return of their earnest money.

The sole question here presented is whether or not the so-called party wall arrangement just referred to constituted an incumbrance upon the said premises.

Inasmuch as the wall in question was situated entirely upon the adjoining lot and there was no duty upon the said Bettler to maintain or repair same, it created no easement or servitude in the premises purchased by plaintiffs, and hence it cannot be regarded as an incumbrance thereon.

Plaintiffs having predicated their right to a recovery of the said earnest money solely upon the theory that the aforesaid party wall arrangement constituted an incumbrance on the premises in question, it follows that they were not entitled to the return thereof.

Accordingly the judgment must be reversed.

REVERSED.

296 - 24223

ABNER C. LOOMIS,
Appellee,

vs.

PHILIP J. SHARKEY, CHARLES A. PECK and E. H. BOLTON,

PHILIP J. SHARKEY and CHARLES A. PECK,
Appellants.

Appeal from Municipal Court of Chicago.

214 I.A. 630

MR. PRESIDING JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse a judgment for $2,190.66 entered against them in an action on certain promissory notes.

During the month of July, 1911, plaintiff, Abner C. Loomis, purchased from one Colles an established business operated as E. G. T. Colles & Company, which for many years had dealt in feed water heaters, boiler-room and steam specialties, etc. Defendant, Bolton, had been employed by said firm for some time prior to said purchase by plaintiff. Shortly after said purchase, plaintiff duly incorporated said business as the E. G. T. Colles Company, under the laws of Illinois, and subscribed for all but two shares of its capital stock, in payment of which he transferred to the corporation the said business, together with all its assets. Plaintiff became president, and the said Bolton secretary thereof.

On October 18, 1911, plaintiff sold his stock in said corporation to the defendants, Sharkey, Peck and Bolton, for the sum of $14,000.00, which said sum was payable in monthly installments of $100.00 each, each installment being evidenced by a note signed by the said defendants, who continued to operate the corporation for several years there-

after; Sharkey, Peck and Bolton being its president, treasurer and secretary, respectively.

During the summer of 1913, said defendants being in arrears in their payments on said indebtedness, they entered into a new contract in lieu of the former one, under date of September 18, 1913. Pursuant to the terms of this latter agreement, defendants paid plaintiff $100 upon the execution thereof, and signed 149 installment notes of $100 each to evidence the remainder of their indebtedness including accrued interest. Thereafter defendants paid 15 of the said 149 notes, but failed to make any further payments.

During the month of October, 1914, defendants sold their stock in said corporation to one Winslow, who agreed to pay them $2,100.00 therefor, and to assume the remaining indebtedness of defendants under the aforesaid agreement of September 18, 1913. No payments having been made to plaintiff thereafter, he brought suit against defendants on the notes which had become due up to that time.

The notes in question were introduced in evidence and their execution by defendants was not disputed. The defense chiefly relied upon was fraud in their consideration, to substantiate which defendants sought to introduce evidence tending to show that plaintiff had made fraudulent statements and misrepresentations with respect to the amount of business done by the said corporation at the time defendants were negotiating for the purchase thereof from him. This evidence, although admitted, was afterwards stricken out on motion of the plaintiff, and thereafter, by direction of the court, the jury returned the verdict upon which the judgment herein complained of was entered.

Inasmuch as the said motion was tantamount to a

after: Harvey, Peck and Holton having its president, treasurer and secretary, respectively.

During the summer of 1912, said defendants being in arrears in their payments on said indebtedness, the relator sue a new contract in lieu of the former one, under date of September 16, 1912. Pursuant to the terms of this latter contract, defendants paid plaintiff $50 upon the mechanics lien, and signed the installment notes of $200 each to evidence the remainder of their indebtedness including accrued interest. Thereafter defendants paid $2 of the said $50 notes, but failed to make any further payments.

During the month of October, 1912, defendants made their notes in said corporation to one Clarkin, who agreed to pay them $2,100.00 therefor, and to assume the remaining indebtedness of defendants under the aforesaid mechanics lien of September 16, 1912. The defendants having been made to plaintiff thereafter, he brought this mechanics lien suit on the notes which had become due up to that time.

The notes in question were indorsed by relators and their ownership by defendants was denied by the defendants. The defendants called upon the Court to make distribution, in accordance with defendants' theory of a mechanics lien, to relators and stockholders of the plaintiff and such financial statements and correspondence with respect to the amount of material furnished by the said corporation at the time mechanics were supplying for the premises therefrom. This argument, although omitted, was afterwards written in notice of the plaintiff, and therefore, by direction of the court, the jury returned the verdict upon which the judgment herein complained of was entered.

Demurrer to the said notice was sustained in a

demurrer to said evidence, its truth must be conceded for the purpose of testing the correctness of the court's ruling.

In describing what took place during the negotiations of 1911, the defendant Sharkey testified as follows:

> "Mr. Loomis gave us a statement in writing; he told us he was getting an enormous profit, - from 100 to 200 per cent.; * * * I had my doubts then about the statement, but Mr. Peck overruled me."

Defendant, Peck, testified that shortly after the execution of the aforesaid contract of October 18, 1911, they realized that plaintiff's representations respecting the amount of business done by said firm were false. Defendant, Bolton, testified that about a week after plaintiff had purchased said business from Collos, he told him that the business was not as represented to him by Collos, and that he wanted to sell out.

Under the facts and circumstances appearing in the record before us, it is immaterial whether the aforementioned representations were true or false. If false, defendants became aware of their falsity immediately after the making of the original agreement and taking over the business in question. Having carried on the business for upwards of three years, during which time payments were made on the notes without protest; having entered into the second contract dated September 18, 1913, by the terms of which the notes sued upon were given, fifteen of which were thereafter paid; and having later sold their stock so purchased from plaintiff, thereby rendering it impossible for them to tender back the consideration received, - defendants cannot now be heard to complain that fraud was practiced upon them by plaintiff. We think the following language of our Supreme Court in <u>Mortimer</u> v. <u>McMullen</u>, 202 Ill. 413, is particularly applicable

answer to such attempts, his study was to concentrate the sole purpose of testing the correctness of the court's ruling.

In describing that investigation during the appellation of 1911, the distinguished Justice Holmes on writing:

> "Mr. Brandis gave me a memorandum on opinions in which he said he was trying to discover what, - I use his words - the Supreme Court had, - or, - I had my doubts about what the Supreme Court, had in mind when they decided cases."

Believing, that, testifies that merely after the decision of the Brandeis Brief of October 1, 1911, Mr. Justice Holmes's representations concerning the amount of business done by said firm were false. Moreover, further, evidence that after a week after publicity has produced his business from failure, he tell him that the business was not so successful as he is telling, and that he needed to sell out.

From the facts and circumstances appearing in the record before us, it is reasonable whether the representations regarding said firm is true. If false, it remains serious issue of fact pertinent particularly after the making of the original statement and before the business is resulting, having worked on the business for upwards of three years, during which the patents were sold to the Duke Tobacco Company; During because 1911 the amount obtained from Duke Company is, 1911, by the issue of which was the same. Some days after, fifteen of which were transferred paid; and having later said that which is prohibited from liability, thereby therefore is impossible for them to insulate back the non-existing business. - Defendants cannot now be heard to complain that from was guilty and open from by plaintiff. To state the relevant language of the Supreme Court in Dunlop v. Bunting, 168 U.S. 131, is particularly applicable

to the facts in the case at bar, p. 418:

> "It is a familiar rule * * * that where a party discovers that fraud has been practiced upon him in the making of a contract, it is his duty at once to repudiate the contract and tender back what has been received by him under its terms, so that all parties may be placed as near as possible in the position occupied before the contract was consummated."

In our opinion, therefore, the trial court properly allowed the motion of plaintiff, to strike all the foregoing evidence from the record and in directing a verdict for the plaintiff.

Other errors have been assigned, which, however, we shall not discuss as, in our opinion, they are not of sufficient moment to warrant disturbing the judgment. Accordingly it will be affirmed.

AFFIRMED.

In the Trial in the Court of Appeal, p. 6[illegible]:

> "It is a fundamental rule of a that where a party
> discovery that fraud has been practised upon him in
> the letting of a contract, it is his duty at once to
> repudiate the contract and notify the other that he
> rescinds it; for he cannot be allowed to lie in wait
> and see how the matter may turn out, and then, if it
> may be found to be to his advantage to do so, rescind
> or affirm before the contract has expired."

In our opinion, therefore, the trial court properly
allowed the motions of plaintiff, in which all the foregoing
evidence [and the ruling] had to dismissing a verdict for the
plaintiff.

Other errors were been mentioned, which, however, we
shall not discuss as, in our opinion, they are not of sufficient
moment to warrant disturbing the judgment. Accordingly it will
be affirmed.

AFFIRMED.

214/631

Filed April 29, 1919

353 - 24230

ANNIE PEARSON, an infant, by her next friend, George Kelly, Appellee, vs. WARD & COMPANY, Appellant.	Appeal from Superior Court, Cook County.

214 I.A. 631 1

MR. PRESIDING JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Annie Pearson, a minor, by her next friend, brought an action in case against Ward & Company, a corporation, defendant, and recovered a judgment for $5,000.00 for injury to her health, alleged to have been caused inter alia through the defendant's failure to comply with the requirements of the Occupational Disease Act (ch. 48, Hurd's R. S.), - to reverse which this appeal has been prosecuted.

The declaration contained several counts, but we deem it necessary to consider only those which charged defendant with negligence in employing plaintiff at work which subjected her to illness or disease incident thereto, without complying with the provisions of the said act.

The evidence shows that defendant was engaged in the manufacture of perfumes, cosmetics etc., employing upwards of thirty girls in its plant; that the perfumes manufactured by it contained approximately 60 per cent. of wood alcohol, a poisonous substance; that plaintiff, a minor, had been employed for upwards of one year in defendant's said plant, at various occupations, the last twelve to seventeen days of which said employment she was engaged in transferring perfume from large containers to one ounce bottles.

Plaintiff testified that in the performance of

the said last mentioned work she was obliged to use a small rubber tube to siphon the liquid from the large receptacles to the bottles, which occasionally necessitated her placing the tube into her mouth to draw the air therefrom and thereby cause the liquid to flow through the tube, into the bottles; that in the performance of her said duties she unavoidably inhaled the fumes from the liquid, and occasionally drew some of the liquid itself into her mouth.

It further appeared from the testimony of plaintiff, that prior to the commencement of said work her health was good; that shortly thereafter her eyes became affected and she became subject to frequent dizzy and fainting spells; that she thereupon consulted a physician who, upon learning the nature of her employment and after making an examination of the perfume which plaintiff had been handling in the course of her employment, advised her to discontinue said work, which she did; that thereafter her dizzy and fainting spells continued, - for the first few months daily, and subsequently less frequently, but that they continued up to the time of the trial, which occurred more than two years after she had ceased said employment; that she also suffered from cramps in the stomach, causing nausea; and that her eyes continued to be weak.

Other witnesses testified on behalf of plaintiff,- girls who had also been employed by defendant at the time plaintiff worked there - stating that they had performed similar work in a similar manner, and suffered injury to their health.

The testimony of plaintiff's family physician was substantially a corroboration of plaintiff's testimony with respect to the facts that she called on him for treatment while employed by defendant, and that he advised her to discontinue her employment because of the deleterious effect it was

having upon her health. He testified further, that he saw plaintiff faint on several occasions; that after learning the nature of her employment and examining the perfume which she submitted to him, he diagnosed her illness as wood alcohol poisoning; that wood alcohol, if taken internally, would seriously affect the optic nerve and retina of the eye, at times causing blindness, and diseased kidneys; that it would also affect the stomach, causing vomiting; and that the poisoning was usually a slow process, - the effect gradual.

Opposed to the foregoing was the testimony of numerous witnesses on behalf of defendant, who stated that it had never been the practice in defendant's plant to siphon the perfume from the receptacles to the bottles, but that each container was equipped with a faucet, to which was attached a rubber tube, rendering it unnecessary to place the tube into the mouth; and that the place where plaintiff had been employed was quite spacious and well lighted and ventilated.

Defendant also introduced the evidence of a physician, who testified that the condition of plaintiff's health could not have resulted from her employment in defendant's factory; that wood alcohol unless taken internally, would not seriously affect the system of one working in close proximity to it, but admitted that wood alcohol poisoning could take place by absorption or inhalation, although he stated this was a very slow process, which would take a very long time to manifest itself in the health of the victim.

On the two foregoing issues, viz., whether or not it was the practice to siphon the liquid from the containers to the bottles while plaintiff was employed by defendant, and whether or not the condition of plaintiff's health resulted from her said employment - the evidence was conflicting. The jury

view. An examination of that case discloses that although the facts are somewhat analogous to those in the case at bar, yet it differs therefrom in this, that the action in that case was brought under the Workmen's Compensation Act, and the Industrial Board there found that the illness complained of was due to an accident. Our Supreme Court, in reviewing the record, held that there was evidence tending to support the said finding, which was therefore conclusive. In the case at bar, the evidence strongly tends to support the finding of the jury, that plaintiff's illness was caused by wood alcohol poisoning, which was peculiar to her said employment, - and we are therefore not in a position to disturb their finding on that issue.

Defendant, by way of an instruction, submitted to the jury the question whether or not there was a willful violation of the said Occupational Disease Act, and the jury by their verdict have decided that issue in favor of plaintiff. No question is here raised as to the sufficiency of the evidence to sustain such finding.

Other questions have been presented which in our view of the case it becomes unnecessary to consider.

Accordingly the judgment will be affirmed.

AFFIRMED.

379 - 24306

JOHN H. GALLAGHER,
Appellee,

vs.

CITY OF CHICAGO, a Municipal corporation, et al.,
Appellants.

Appeal from
Superior Court,
Cook County.

214 I.A. 631

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Appeal from order directing that a writ of mandamus issue, compelling respondents to reinstate petitioner, John H. Gallagher, as senior detective sergeant in the police department of the City of Chicago.

The petition set forth, among other things, that prior to July 6, 1896, the petitioner took the regular civil service examination for the office, position, or place of employment of police patrolman in the department of police of the City of Chicago; that the civil service commission duly certified his name, together with others, on a list of applicants who had successfully passed said examination; that thereafter the petitioner was duly appointed to the said office, position, or place of employment of police patrolman, in which capacity he served for several years; that on August 14, 1900, petitioner took an examination for promotion to the bank of detective sergeant; that on January 4, 1901, the civil service commission posted a list of the applicants who had successfully passed the said promotional examination, which said list contained the name of the petitioner; that on February 1, 1901, he was promoted to the rank of detective sergeant, and on February 3 entered upon his duties and continued as such until removed therefrom, as hereinafter set forth; that appropriations were made by the

214 LA. 631

Signal from Stalin indicating that a week of [illegible] time, complicated preparations in Leningrad notwithstanding, the G. Politburo, as another diplomatic movement on the Polish Ambassador of the King of Poland.

The position was tense, among white Russians, that prior to July 6, 1920, the petitioner took the regular civil service examination for the office, position, or place of employment of public prosecutor in the Government of Saint of the King of Poland; that the civil service commission duly certified his name, together with others, on a list of qualified who had successfully passed said examination; that thereafter the petitioner was duly appointed to the said office, position, or place of employment of public prosecutor. On which information he entered the general jurisdiction of the Tsar, petitioner, that on August 11, 1920, petitioner took an examination for the position in the Tsar of Poland; that on July 6, 1920, the civil service commission prepared a list of the applicants who had successfully passed the civil procedural examination, which was the same of the petitioner; that on February 1, 1920, he was promoted to the Tsar of Poland, and on February 3 received that his duties was transferred to Tsar until further directed; in accordance was [illegible]; that appointments were made by the

city council of the City of Chicago, of funds to meet the salaries of the number of detective sergeants duly appointed and acting in that capacity, out of which said fund the petitioner was paid his salary until removed; that by an ordinance duly passed by the said city council on July 15, 1912, the civil service commission of the city of Chicago was authorized to classify the various offices and positions coming under its jurisdiction, including that of the petitioner, and that pursuant thereto petitioner's office or position or place of employment was designated and thereafter known as that of senior detective sergeant; that the city council of the City of Chicago thereafter made annual appropriations of funds for the payment of salaries of senior detective sergeants, out of which petitioner's salary was paid; that the duties and salary of a senior detective sergeant and of a detective sergeant were identical, the only difference being in the name of the office or position.

The petition further averred that on February 28, 1917, the general superintendent of police of the City of Chicago entered an order demoting petitioner to the rank of desk sergeant, - an office or position which was inferior in rank, salary etc. to that of senior detective sergeant - without cause and without preferring charges against petitioner; that one Patrick Ward was thereupon temporarily promoted from the rank of desk sergeant to that of senior detective sergeant, in petitioner's stead; that the duties incident to the aforesaid positions and the examinations and qualifications therefor were entirely different; that petitioner never took the examination or qualified for said office or position of desk sergeant, while the said Ward had, but that the latter had never taken the examination or qualified for the office or

position of senior detective sergeant.

Then followed the prayer that a writ of mandamus issue, compelling certain officers therein named to perform their proper official duties therein mentioned, to restore petitioner to the office, position or place of employment of senior detective sergeant etc.

To the foregoing, the respondents filed a general and special demurrer, setting forth, among other grounds therefor, (a) that there was a misjoinder of the parties, (b) that the petition failed to set forth ordinances which created the office of senior detective sergeant, and (c) that the petition also failed to show that the petitioner had ever been appointed thereto.

The court overruled said demurrer, and thereupon entered an order directing that a peremptory writ of mandamus issue against the City of Chicago; William H. Thompson, its mayor; Herman F. Schuettler, its superintendent of police; Alexander Johnson, Joseph F. Geary and Charles E. Frazier, or their successors in office, its civil service commissioners; Clayton F. Smith, its treasurer; and Eugene R. Pike, its comptroller, respectively, commanding them and each of them to perform their proper duties to restore petitioner to the office or position or place of employment of senior detective sergeant in the police department of the City of Chicago, to enable him to perform the duties of the said office, position or place of employment of senior detective sergeant etc., and receive the salary and emoluments, the rights, perquisites and privileges of the said office or position or place of employment, in accordance with the Civil Service Act and the rules of the said civil service commission of the city of Chicago; and

forthwith to place the name of petitioner on the payroll of the city of Chicago as senior detective sergeant of the police department thereof; and the said civil service commissioners and the said city comptroller, to certify to the city treasurer that the petitioner was occupying said office of senior detective sergeant etc., and the said city treasurer to pay to petitioner the salary appropriated for the office of senior detective sergeant subject to the laws, rules and ordinances pertaining to senior detective sergeant of police etc.

It is argued in support of the first point upon which the said demurrer was based, that the City of Chicago and its mayor were unnecessary and improper parties to the proceeding, for the reason that the former acts only through its officers and agents, and the latter clearly has no specific duty to perform in connection with the reinstatement of the petitioner.

Conceding that the said respondents were not necessary parties, in our opinion the writ may still be sustained as against those whose duty it was to reinstate petitioner to his said office or position. State ex rel v. Board of Supervisors et al., 66 Wis. 199; State ex rel. v. Pan American Co. et al., 61 Atlantic 398.

Whether or not the petition set forth ordinances creating the office of senior detective sergeant is, in our opinion, immaterial, as the petitioner based his right to the writ upon the theory that he was the lawful incumbent of the "office, position, or place of employment of senior detective sergeant," from which he contends he was unlawfully removed. If, as contended by respondents, there is no such office as senior detective sergeant, or that the petitioner has not set forth any ordinance creating such alleged office, petitioner's right to the writ may still be sustained on the theory that he

seeks his reinstatement to a position or place of employment to which he was lawfully entitled and from which he was unlawfully removed. People v. Coffin, 282 Ill. 599. In our opinion, therefore, the court properly allowed the writ.

Other points have been raised by the respondents which, however, we shall not discuss, as in our opinion they are not of sufficient moment to warrant a reversal.

Accordingly the judgment will be affirmed.

AFFIRMED.

388 - 24315

HELENA OSWALD,
Appellee,

vs.

JACOB PROBST,
Appellant.

Appeal from
Municipal Court
of Chicago.

214 I.A. 631[3]

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

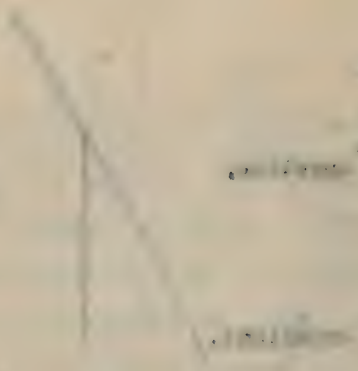
This is an appeal by the defendant, Jacob Probst, from a judgment for $470.00 in favor of plaintiff, in an action on an account stated, tried before the court without a jury.

Plaintiff's verified statement of claim alleged that the defendants, Jacob Probst and Emma Probst, were indebted to her in the sum of $600.00 on an account stated by and between plaintiff and the said defendants, on or about February 12, 1913, at Chicago.

Defendants, in their affidavit of merits, denied that they or either of them were indebted to plaintiff in the sum of $600.00 or any sum whatsoever, on an account stated, or that they or either of them were otherwise indebted to the plaintiff, in any sum whatsoever.

Before trial, on motion of plaintiff, Emma Probst, defendant's wife, was dismissed out of the case.

Plaintiff and defendant were the only witnesses who testified upon the trial. Plaintiff's testimony whereby she sought to establish the account stated, was vague and indefinite, and somewhat contradictory, both as to the nature of the alleged indebtedness and as to the time when the account was claimed to have been stated. Defendant's testimony was a complete denial



of any and all indebtedness to plaintiff.

The trial court, in effect, held that plaintiff had failed to establish an account stated as alleged, and from an examination of the evidence, we are of the opinion that such finding was proper.

The court expressed the opinion, however, that apparently there was something due plaintiff, and although no amendment was asked or made, entered the judgment herein complained of. In this we think the court clearly erred. It is well settled that even in municipal court actions, the proof must correspond with the pleadings. (Walter Cabinet Co. v. Russell, 250 Ill. 416.) So in the case at bar, plaintiff cannot make one claim in her statement and recover upon proof of another, without amendment, even if we were to assume that the evidence showed there was something due plaintiff.

Accordingly the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

of gas and all investigations in electricity.

The high-tide swept, in effect, held upon electricity was failing to satisfying to consumer status as simply, and then an evaluation of the entirely, as one of the factors that was failing was proper.

The court understand the opinion, however, that apparently there was somewhere gas electricity, was although as consumers was equal or only, solution the proposed tariffs complained of. It seems to claim to a very clearly error. It is well settled that gas is monopoly every reason, the great main corresponds with the plaintiffs. (Walker Bank & Tr. v. Ingersoll, 200 Ill. 404.) or in the case of Dr. electricity cannot make the claim in our statutes and consider some great of matter, without government, even if we grant to assume that the utilities choose there are supplying the plaintiff.

Accordingly the judgment that by interest and the case reversed.

REVERSED AND REMANDED.

72 - 24366

THE OIL TRUST, LIMITED,
Plaintiff in Error,

vs.

INTERNATIONAL ASPHALT COMPANY,
a corporation, et al.,
Defendants in Error.

Error to
Circuit Court,
Cook County.

214 I.A. 631

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Bill by The Oil Trust, Limited, an English corporation, as a stockholder of the International Asphalt Company, an Illinois corporation, against the said last mentioned corporation, and others, for the appointment of a receiver, etc.

Demurrer to the bill sustained, and bill dismissed for want of equity.

The controlling question here presented is whether or not the complainant corporation has the right, as a stockholder of the defendant corporation, to maintain the action in question.

In Golden v. Cervenka, 278 Ill. 409, it was held that a foreign corporation, though authorized by its charter to own and hold stock of another corporation, and licensed to do business in Illinois, the license expressly authorizing it to buy, sell and deal in corporate stocks, could not own stock in, and hence could not be held liable as a stockholder of a bank organized and doing business in this State. The court, in passing upon this question, used the following language, p. 440:

> "A domestic corporation is not authorized to hold stock in another corporation, and a foreign corporation can exercise no powers in this State which cannot be lawfully exercised by a domestic corporation. (Dunbar v. American Telegraph and Telephone Co., 238 Ill. 456.) Therefore the license to John Burnham & Co. did not authorize that corporation to buy, sell or hold in the State of Illinois stock in another corporation. The purchase of such stock and its transfer to John Burnham & Co. were ultra vires and void."

In our opinion, the case at bar is controlled by the decision of our Supreme Court in the Golden case, supra, and therefore the judgment must be affirmed.

AFFIRMED.

82 - 24383

T. W. BETAK,
Defendant in Error,

vs.

R. G. DWEEN,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

214 I.A. 631[5]

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment for $100.00 entered upon a claim for $310.00 which plaintiff alleged was the balance due him for services rendered as an accountant.

The sole question presented is whether or not the finding of the court is sustained by the evidence.

The controversy between the parties was as to the amount agreed upon for the services in question. Plaintiff testified that the figure agreed upon was $460.00, upon which $150.00 had been paid by defendant, leaving a balance due of $310.00; while defendant contended that the amount fixed was $150.00, which he had fully paid.

In view of the foregoing, it is clear that the judgment for $100.00 cannot be reconciled with any theory of either the plaintiff or the defendant, and finds no basis in the evidence. For this reason it becomes necessary to reverse the judgment and remand the cause for a retrial.

REVERSED AND REMANDED.

104 - 24408

F. A. WINSHIP,
Appellee,

vs.

HARPER AND BROTHERS,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

214 I.A. 632

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment for $375.00 in favor of plaintiff, as one and one-half months' salary under a certain contract of employment.

It appears from the evidence that plaintiff had been employed by defendant in the capacity of office manager for upwards of ten years; that on June 3, 1907, the parties hereto entered into an agreement by the terms of which plaintiff was to have charge of defendant's Chicago office, at a salary of $250.00 per month, the said agreement being subject to cancellation by either party on thirty days' notice; that on November 22, 1917, the president of defendant company wrote plaintiff in part as follows:

> "I regret to advise you that because of the continued unprofitable condition of your office, I have decided that it becomes necessary to make a change; therefore, on Friday (November 30th) Mr. Daniel I. Lennon will take charge of the office.
>
> "Of course you understand that I want to treat you very fairly, and assuming that it will not be possible for you to turn around and arrange for something else at once, I am very willing to have you continue in our services, to help Mr. Lennon get straightened out, giving such time to him as he may need, and your pay to continue as at present until, say January 15th."

To this letter plaintiff replied under date November 24th as follows:

> "Your letter of the 22nd was naturally a painful surprise as my eighteen years of service with Harper & Broth-

ers certainly entitled me to more than six days' notice of discharge.

"Would you care to let me have my salary to January 15th on November 30th, as this quick change will put me to some extra expense?

"I shall gladly be of all possible help to Mr. Lennon."

It further appeared from the evidence that the said Lennon took charge of defendant's Chicago office as plaintiff's successor, on November 30, 1917; that on said date plaintiff explained to the said Lennon that he was indebted to defendant in a certain sum, which he thereupon offered to make good, and tendered defendant a check for the difference between said indebtedness and $375.00, the amount of his salary from November 30, 1917, to January 15, 1918, as per the foregoing letter; that said check was rejected by defendant; that plaintiff continued in defendant's employ, assisting the said Lennon in his new work as office manager, up to and including January 4, 1918; that plaintiff thereafter, until January 15, 1918, continued to hold himself in readiness in the event the said Lennon should call upon him for further assistance; that the amount of money due and owing from plaintiff to defendant was paid by plaintiff's surety.

It is virtually conceded that the foregoing letter of November 22, 1917, to plaintiff and his reply thereto of November 24th, constituted an agreement between the parties to continue plaintiff's employment from November 30, 1917, to January 15, 1918, at a salary of $250.00 per month.

Defendant contends, however, that the said agreement was voidable and that it had the right to rescind same upon learning of plaintiff's alleged defalcations. It is clear from the undisputed evidence, however, that plaintiff notified defendant of this shortage on November 30th, when the said Lennon took charge of the Chicago office, and that defendant, with such knowledge, accepted plaintiff's services for upwards of a month

[illegible]

[illegible]

[illegible]

thereafter. Defendant is therefore not now in a position to complain of plaintiff's alleged previous misconduct.

Nor can it be said that the said agreement was without consideration. Plaintiff was entitled to thirty days' notice under the original agreement. The letter of November 22nd constituted only six days' notice. Plaintiff accepted the offer to continue in defendant's employ for six weeks longer, and did in fact perform services for the greater part of that time, being ready and willing to perform up to January 15, 1918, if called upon.

In our opinion, therefore, the court properly entered judgment for plaintiff in the sum aforesaid.

Other questions have been raised which, however, we shall not discuss save to say that in our opinion they are not controlling.

Accordingly the judgment will be affirmed.

AFFIRMED.

118 - 24424

WANDA WYSCOKA,
Appellee,

vs.

JOSEPH BRYKCZYNSKI,
Appellant.

Appeal from
Circuit Court,
Cook County.

214 I.A. 632

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment rendered in favor of plaintiff, in an action on the case for the breach of a contract to marry.

It was admitted on the trial that defendant had agreed to marry plaintiff and that he subsequently refused to carry out said agreement. The defense relied upon in justification of the breach was the alleged unchastity of the plaintiff, which the defendant testified came to his knowledge after the aforesaid promise had been made.

The chief testimony relied upon by defendant to substantiate his defense was that of one Zydlewski, who stated that he had, on several occasions, sustained immoral relations with plaintiff during defendant's courtship of her. Plaintiff denied all the charges so made, and disclaimed any acquaintanceship whatsoever with the said witness.

The controlling question here presented is one of fact, viz., whether or not defendant has sustained his charge of unchastity against plaintiff, in justification of his admitted breach of promise. In view of the conflicting nature of the evidence, considered in the light of other circumstances revealed by the record, we are not prepared to hold that the verdict is clearly and manifestly

against the weight of the evidence.

Defendant also complains of the remarks made by counsel for the plaintiff in his argument to the jury. While exception was taken to the conduct complained of, yet no objection was made thereto and the court was not called upon to make a ruling. In such a situation there is no question presented for review. M. C. C. Ry. Co. v. Cotton, 140 Ill. 486.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

282 - 24209

CHARLES OECHSLE,
Appellee,

vs.

HENRY J. ALLMENDINGER,
Appellant.

Appeal from
Municipal Court
of Chicago.

214 I.A. 632

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The transcript of record in this case contains no bill of exceptions, but the clerk improperly inserted therein certain affidavits which were stricken therefrom June 6, 1918. Appellee's brief, subsequently filed, not having called our attention to the order striking them, we failed to take note of it in deciding the case, but because of the oversight have granted a rehearing. The entry of said order leaves before us the common law record only.

The record shows that the summons was returnable and returned on July 18, 1917, as served on defendant July 13, 1917, in a fourth class case; that on September 11, 1917, the suit was called and dismissed for failure to prosecute, and a motion by plaintiff entered to vacate the order of dismissal; that on September 18, 1917, the order of dismissal was vacated, a rule entered against defendant to appear instanter, a default taken against him for failure to appear, the case called for trial and evidence heard, and judgment entered against defendant for $500; that on October 18, 1917, defendant entered his appearance and moved to vacate the order of default and judgment; and that on November 19, 1917, his motion was overruled and an appeal prayed.

Appellant having been served with summons it was his duty to take notice of the law, which he was presumed to know, that default and judgment could be entered against him on and after the return of such summons, unless he made his appearance as the statute provides. (Hishoff v. People, for use etc. 171 Ill. 243-248; Massachusetts Life Ins. Co. v. Kellogg, 82 id.614.)

Appellant urges that he was entitled to notice of the rule entered on him after the case was reinstated. But the court having jurisdiction to reinstate it, and he not having entered his appearance before it was reinstated, in the absence of rules of court (which, if they existed and were relied on, should appear in a bill of exceptions) appellant was not entitled to special notice of the rule "as the presumption of law is that by reason of the service of summons the defendant is constantly present in the court, and therefore has notice of all that takes place." (See the two cases supra.)

As the court had jurisdiction both of the defendant and the subject matter, we must, in the absence of anything in the record to indicate the contrary, indulge in the presumption of the regularity of the proceedings. If any irregularity could have been disclosed by a bill of exceptions then appellant failed to avail himself of the given opportunity to file such a bill. The judgment will be affirmed.

AFFIRMED.

Excellency Sotheby Bank Mortgage will exercise it was his duty to state decision of the law, which he was commanded to issue, that defendant was justified in without expense like an and after the return of such economic values to make his appearance as the minutes provided. CLARKSON v. JONES, 32 Ind. 475 (1870). BOOKKEEPERS DATA AND. Id. v. DILLONS, 41 Ind.474.)

Applicant argues that he was entitled to notice of the rule nisiere on his after has been reinstated. Has the court having jurisdiction to reinstate it, was he not taking without his attorneys notice it was relinquish, in his absence or value of equal [illegible], if they obtained and only right [illegible], should answer to a bill of exceptions [illegible] was not entitled to special notice of the rule for the proceedings of law to take by reason of the period of remedies was otherwise in consequently [illegible] to the court. The [illegible] has notice of all [illegible] [illegible] place.[illegible] [illegible] [illegible].

In the court has jurisdiction [illegible] of the defendant and the [illegible] notice, or when, in the absence of [illegible] the right to indicate the authority. Liability in the [illegible] of the [illegible] at the [illegible]. If any [illegible] [illegible] have been dismissed by a bill of exceptions then [illegible] [illegible] is well [illegible] of the [illegible] [illegible] in [illegible] a bill. The lawyers will be affirmed.

311 - 24236

GEORGE S. KENNY,
Appellee,

vs.

E. F. McDONALD & COMPANY,
a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

214 I.A. 632

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Action of replevin and trover; finding of conversion and damages at $300; judgment accordingly, and appeal by defendant.

Defendant having refused to turn out the property replevied on the bailiff's demand, and the writ being returned unexecuted as to the same, the issue to be tried was the right to possession of the property - an automobile - on the date of the replevin, August 23, 1917, and its value, if wrongfully taken.

Plaintiff gave defendant a chattel mortgage on the automobile March 13, 1917, to secure his six notes aggregating $263, the last two falling due August 13 and September 13, 1917, respectively. Defendant took possession of the automobile August 21, 1917, claiming the right thereto under said mortgage. The only ultimate fact in dispute was whether plaintiff paid the note that matured August 13, it being conceded that all others except the last to mature had been paid. The evidence on that question so clearly preponderates in plaintiff's favor we shall not discuss it. Said note having been paid and the remaining note not having matured before the replevin, there was no support to the claim of right of possession by virtue of

default in payment of any of the notes.

The only other claim to the right of possession set forth in the affidavit of defense was that defendant deemed itself insecure. There was no evidence whatever to sustain such defense, but, on the contrary, the evidence was such as to challenge defendant's good faith in taking possession under such a claim if relied on.

Appellant urges, however, that if there was no default in payment yet it had the right to possession under another clause in the mortgage, that giving the right "if the mortgagee shall choose to take possession of the property." Whatever construction or application might be given to that clause need not be considered as it was not made a ground of defense either in the pleadings or at the trial, and cannot be urged here for the first time.

AFFIRMED.

default in payment of any of the notes.

The only other claim is the right of permanent set forth in the activity of defendants was that independent personal liability incurred. There was no evidence adduced to sustain such defense, but, on the contrary, the evidence has made it challenge defendant's good faith in taking possession under such a claim or title as.

Appellant argues, however, that if there was no default in payment yet it had the right to prematurely make another change in the mortgage, that gives the plaintiff "at the mortgagee could change or take possession of the property." Whatever construction or qualification might be given to that clause that put be considered as it was not made a ground of defense raised in the pleadings or at the trial, and cannot be urged here for the first time.

AFFIRMED.

330 - 24257

RICHARD G. PIERCE,
Appellee,

vs.

JOHN HAPP and HANNAH HAPP,
Appellants.

Appeal from
Circuit Court,
Cook County.

214 I.A. 632

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a bill to enforce a mechanic's lien for preparing and furnishing plans and specifications for a garage which were used in its erection. The decree gives a lien for $300.

The bill alleges that there was a verbal agreement between complainant Pierce, an architect, and defendant John Happ, the owner of the garage, that the former "should prepare plans, specifications, and superintend the erection and construction of said building," and that the latter "would pay your petitioner for such plans, specifications and superintending the sum of $300." Pierce's own construction of the verbal contract is as follows:

> "We didn't figure out how much of the $300 we were to receive was to be for the plans and specifications and how much of it for superintending the erection of the building. We did not divide the amount that way, but the amount of $300 was to include both."

Both according to his testimony and the petition this was an entire contract under which he was to receive $300 for both superintending the construction and preparing the plans and specifications. The sum he was to recover for each was not apportionable under his contract or according to his testimony. He did not superintend the construction, and of course cannot obtain a lien for work not performed, even though performance was prevented by the owner's breach of

contract. (Marsh v. Wick, 159 Ill. App. 399; Herr v. Slavik, 35 Ill. App. 140.) Conceding that the work done in preparing the plans and specifications is lienable, the work of superintending is not, and therefore as the contract is entire, and an entire contract can not be apportioned it cannot be enforced in this proceeding. (Adler v. World's Pastime Exposition Co., 126 Ill. 373; Cronin v. Tatge, 281 Ill. 336.) As under this state of facts no lien can be enforced, the decree will be reversed with directions to dismiss the petition.

REVERSED AND REMANDED, WITH DIRECTIONS.

341 - 24268

WILLIAM N. MARTIN, Appellee, vs. CHICAGO LEAGUE BALL CLUB, a corporation, Appellant.	Appeal from Superior Court, Cook County.

214 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee attended a baseball game conducted by appellant on its grounds where it gave exhibition games for the amusement of the public for hire. The game was calculated to draw a large attendance. In anticipation of that fact plaintiff went to the grounds about two hours before it started. When he and his friends went inside the grounds every seat was taken and they were directed to a place in the field that soon became crowded, where they were obliged to stand. While standing on his tiptoes, peering over the heads of the crowd, he was pushed over by the jostling of the crowd and fell on the ground and received a cut on his hand. To recover for injuries sustained he brought this suit.

The several counts charge substantially the same negligence, that defendant "suffered and permitted bottled goods to be sold on said grounds, and the empty bottles to be strewn and broken on said grounds," and that "by and through the force of the immense crowd there assembled, and in the rush of said crowd that then and there took place, the plaintiff was thrown to and upon the ground and upon the broken glass with which such ground was strewn, and plaintiff's hands were greatly torn, cut and lacerated" etc. It is also alleged that defendant

allowed admissions in excess of the seating capacity of the grounds.

We do not understand that appellee does, or well can, predicate his claim of negligence on the want of seating capacity, or upon the allegation alone that defendant suffered and permitted bottled goods to be sold on the grounds, but rather upon the claim that defendant permitted empty bottles to be strewn and broken thereon. The main facts submitted for the jury were whether defendant did suffer and permit bottles to be so strewn etc. and whether plaintiff was injured from a broken bottle or glass when he fell.

The burden was upon plaintiff to prove by a preponderance of evidence these two latter charges. While there was evidence tending to show that some broken bottles were seen on the ground, and plaintiff himself remembered seeing only one, he alone testified to the details of the accident, and said that he did not see what he was cut on, - that it might have been a piece of glass. It is only by a remote inference the jury could have found that he was cut by a broken bottle, or, if so, that it was one suffered and permitted by defendant to be thrown upon the ground. On the other hand, it was shown by defendant that while through a concessionaire it sold bottled goods, some spectators brought their own bottled drink; that the fifty or more boys who sold bottled goods to the crowd were instructed to take back the empty bottles, and that some twelve or fifteen boys were hired for the express purpose of picking up such as were thrown upon the ground. It was not made to appear, except by remote inference as aforesaid, that plaintiff was cut by a broken bottle or glass, or, if so, that he was cut by one allowed to remain on

the ground for any interval; and if he was cut by one brought into the grounds by some spectator, as is equally palpable from the evidence, there was no showing of inadequate measures to guard against its being left on the ground.

There can be no question about the measure of defendant's duty toward the public invited to its place of amusement. It was not an insurer of the safety of spectators, and its duty is measured only by the standard of ordinary care. Authorities need not be cited on this subject, as there is substantial agreement between the parties with respect thereto. If there was evidence tending to show negligence in permitting bottles to be so strewn and lie upon the ground, or a failure to exercise ordinary care for the safety of the public in that respect the case was properly submitted to the jury.

But assuming that there was evidence tending so to show, still we think the verdict was manifestly against the preponderance of the evidence. It certainly cannot be contended that it was negligence to sell bottled goods to the spectators under such circumstances, and we cannot say that there was not reasonable care exercised to gather up the bottles that might be dropped, or that it was shown that the number of employes designated to gather up the bottles was inadequate for that purpose. Plaintiff at best made a mere prima facie case which was met by undisputed evidence tending to show, as we think, the exercise of ordinary and reasonable care for the safety of the invited public. The judgment will accordingly be reversed.

REVERSED WITH A FINDING OF FACT.

341 - 24268

FINDING OF FACT.

We find that appellant, Chicago League Ball Club, did not suffer or permit empty and broken bottles or broken glass to remain on the exhibition grounds where and at the time appellee was injured as alleged in the statement of claim, but on the contrary exercised reasonable care to prevent the same from being thrown upon the grounds and also have such as were thrown upon the grounds speedily removed therefrom.

97 - 24400

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, a corporation,
Appellant,

vs.

YELLOW CAB COMPANY, a corporation,
Appellee.

Appeal from Municipal Court of Chicago.

214 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant set up as its cause of action that it had insured an automobile of one Weddles for property damages thereto, that it was damaged to the extent of $159.10 in a collision with one operated and controlled by defendant through the latter's negligence, that it had paid Weddles that sum and taken an assignment from him of all his rights and claims arising as a result of said collision, that it so notified defendant, and that although often requested defendant has refused to pay it that sum. Defendant's affidavit of merits pleaded a release to it by Weddles of any and all such claims, that it had no notice of any subrogation or assignment pleaded by plaintiff, and denied the charge of negligence and the extent of the damages. The case was submitted to the court without a jury upon a stipulation of facts pertaining to all the issues thus raised except the charge of negligence and extent of damages. The stipulation concludes as follows:

> "It was stipulated and agreed that the above facts be submitted to his honor, Judge John F. Haas of the Municipal Court of Chicago, for the purposes of determining whether the above release pleaded by the defendant constituted a defense to the plaintiff's claim for property damages. If it did not, the matter was to be tried on the merits as to the defendant's liability for the accident; and if it did, the case was to be determined in the lower court with the right of appeal to the Appellate Court reserved in either party."

Upon such stipulation without additional evidence or submission of any proposition of law the court found the issues against the plaintiff and entered judgment on the finding. While the record does not disclose that the finding and judgment rested solely on determining one issue in the case, that relating to the pleaded release, still the court could enter no other judgment on this record than one against the plaintiff in the absence of any evidence to show defendant's liability, which was distinctly put in issue.

It must be conceded that the parties could not properly submit the case for trial on one issue at a time and rest the entire merits of the case on the decision of one of several material matters put in issue. But appellant having chosen to try its case in that way, and thus having failed to assume the burden of introducing evidence on the other issues formed, it cannot complain that the court entered the only final judgment possible under the issues formed and the evidence adduced, whether the court labored under a misapprehension or not as to the right of having the case tried and reviewed by piecemeal. As plaintiff was not deprived by anything the court did of the given opportunity to try its whole case it cannot complain that it chose the improper method of trying part of it. The case should have been tried in a manner to determine the entire controversy so that if the trial court entered the wrong judgment this court could correct any error and enter the right one. But, as the final judgment is not due to any error of the court but to the method pursued with appellant's express assent whereby it failed to assume the burden of proof on the issues formed, we must view the record according to its effect showing that plaintiff saw fit to rest its case on insufficient proof to

sustain the cause of action. Accordingly the judgment will be affirmed.

AFFIRMED.

24968

HARRIET HUMILSTON,
Appellee,

vs.

FRANCIS R. DENNIS et al.,

on appeal of FRANCIS R. DENNIS,
Appellant.

Interlocutory.
Appeal from
Superior Court,
Cook County.

214 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal by Francis R. Dennis is one of five separate appeals, one each by said Dennis, Charles Rayhorn and Henry Kahney, and two by Steve P. Lalor, from an order denying their respective motions to dissolve a temporary injunction first entered on the original bill of complaint without notice or bond, and later, after notice, continued in effect on an amended and supplemental bill. The several appeals have been consolidated for hearing. The ground for reversal is the same in each, - that there is no equity on the face of the amended and supplemental bill, and that it is insufficient to sustain the order "restraining and enjoining the defendants from concealing, selling or disposing of any of the notes or the proceeds thereof and any of the corporate stocks delivered to them or any of them by the complainant in connection with the trading to the complainant by the defendants or any of them of a tract of land situated in Volusia County, Florida, and from exercising any rights of ownership of said corporate stocks" until further order.

Included among the defendants is Greenebaum Sons Bank & Trust Co. in whose bank the bill charges Lalor has deposited the proceeds of certain of said notes. One of Lalor's appeals is from the injunction against said

Company, which, however, rests on the same grounds as the other appeals.

Without setting out the voluminous bill at length or any more than what indicates its sufficiency, it charges in substance and effect that the four defendants, Dennis, Lalor, Rayhorn and Kahney conspired and confederated together for the purpose of cheating and defrauding complainant out of certain described corporate stock and promissory notes given by her for an agreement to convey to her "free and clear of all encumbrances, except taxes for the year 1918, and all assessments," 15,000 acres of land in the State of Florida owned by defendants Rayhorn and Kahney; that Lalor and Dennis were acting for and in her behalf in conducting negotiations initiated by Lalor for the purchase of said property; that she had previously dealt with Lalor and had implicit trust and confidence in him, and also believed in the honesty and integrity of Dennis; that they were to effect the arrangement without personal profit to themselves (she having lost on a previous deal made through Lalor); that they made certain false representations to her respecting the character and nature of the land, its value and encumbrances thereon, upon which she relied, by reason of which she was induced to part with said stock and notes, alleged to be now in the possession of "said defendants" (except such as have been disposed of, and it is with respect to such that other defendants not appealing are made parties to the injunction), and that a deal was consummated between complainant and said conspiring defendants whereby against her refusal to accept the same a deed for the land was executed to her and sent to Florida for record, and the notes, stock, etc., were delivered to "defendants", out of which Lalor and Dennis realized a profit

of $50,000.

The bill is inartistically drawn and leaves much for inference. It avers that complainant "was led to believe" certain things by representations which are not directly set forth, but which perhaps may be inferred from other parts of the bill, and uses the terms "said defendants" and "they" with some degree of indefiniteness. It sets forth very meagerly the facts on which the relation of trust and confidence between complainant and Lalor and Dennis rests, and some of the alleged false representations might be deemed mere matters of opinion. And but for the allegation charging conspiracy as a fact, there is nothing in the bill that would justify the injunction against Rayhorn and Kahney. However, that allegation presents an issuable fact, even though not supported by averments from which their part in the conspiracy could be logically inferred. Of course, if there was a conspiracy in fact as alleged, then each defendant charged therewith would be chargeable with the specific false representations alleged to have been made by Lalor and Dennis to carry it out. These representations were that the land was "adapted for raising crops," that from the original tract various persons had bought smaller tracts and successfully cultivated the same, that the land "was not cut up with water," and was free and clear of all liens and encumbrances except a mortgage.

These representations - some of which were at least material, considering the trust imposed and the distance the property was from Illinois, where the arrangements were made - were negatived by averments that the land had numerous cypress ponds and swamps, was subject to a ditch tax of $150,000, and a reservation of timber to a certain company

for 30 years, was not adapted to cultivation, that said purchasers of tracts had abandoned them because they were unable to successfully cultivate them, that the market value was less than one-half of what it was represented to be.

The bill alleged that complainant had rescinded the contract on learning of the falsity of such representations, and made a demand for the property she had so delivered, with which defendants refused to comply.

While we cannot commend the form of some of these statements on which complainant relies for equitable relief, yet we think the bill contains enough to require us to sustain the temporary injunction until the merits of the case can be heard, unless it is specially demurred to.

In reaching this conclusion it is unnecessary to discuss authorities pertaining to unquestioned principles of law and equity presented in the respective briefs. It is merely a case of their application. If Lalor and Dennis undertook, as alleged, to act for and in behalf of complainant without profit to themselves, and actually consummated a deal for her whereby they made without her consent a profit to themselves, then there was at least an informal relation of trust which they abused. And regardless of whether such a relation existed or not, we think the allegations of false representations and that complainant was induced to part with her property, believing and relying upon such false representations, the truth of which she could not, on account of the distance of the land from the place of negotiations, readily investigate, make at least a <u>prima facie</u> case that justifies the injunction.

AFFIRMED.

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for 20 years, was not adopted in Philadelphia, but with qualifications of treaties that directness that treaties that made treaties in commercial relations cease, when the mutual value was less than measured by what it was originally in 1800.

The bill adopted didn't complicated the treaties the Constitution be invoking of the fidelity of such representations, and made a demand for the security who had an interest, with which reciprocity returns be sought.

Only on account assumed the time of some of these statements on which commercial relations for negotiate relief, yet we think the bill includes enough to relevant on in matters the structure interpretation until the merits of the case can be heard, unless it is specially treaties to.

In reading this resolution it is necessary to observe distinctions pertaining to constitutional principles of law and really presented in the Independent States. It is matter a case of great magnitude. If Debtor and Creditor contracted, as alleged, in not the and to trial of complicated without really in dismissed, and strongly recommended a bond for the whole line which either for commerce a people to therefore, then there was no issue of federal relation of state which they choose. The transfer of whether both a relations existed or not, as since the difficulties of Peace representations and that complained was between the part with the property, believing the really open such this treaties-the trial of which the well not, on account of the disclaimer of the same from the place of negotiations, really interpleaded, made to issue a action legal also that justifies the judgment.

LITTLETON.

24969

HARRIET HUMISTON,
Appellee,

vs.

FRANCIS R. DENNIS et al.,
On Appeal of CHARLES RAYHORN,
Appellant.

Interlocutory.
Appeal from
Superior Court,
Cook County.

214 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal by Charles Rayhorn has been considered and heard with a separate appeal from the same interlocutory order by Francis R. Dennis in case Gen. No. 24966, and reference is hereby made to the opinion filed in that case for our reasons in affirming the same.

AFFIRMED.

101

24970

HARRIET HUMISTON, Appellee, vs. FRANCIS R. DENNIS et al., On Appeal of H. KAHNEY, Appellant.	Interlocutory. Appeal from Superior Court, Cook County.

214 I.A. 633 5

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal by Henry Kahney has been considered and heard with a separate appeal from the same interlocutory order by Francis R. Dennis in case Gen. No. 24966, and reference is hereby made to the opinion filed in that case for our reasons in affirming the same.

AFFIRMED.

24971

HARRIET HUMISTON,
Appellee,

vs.

FRANCIS R. DENNIS et al.,

On Appeal of STEVE P. LALOR,
Appellant.

Interlocutory.
Appeal from
Superior Court,
Cook County.

214 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal by Steve P. Lalor has been considered and heard with a separate appeal from the same interlocutory order by Francis R. Dennis in case Gen. No. 24966, and reference is hereby made to the opinion filed in that case for our reasons in affirming the same.

AFFIRMED.

103

24972

HARRIET HUMISTON,
(Complainant),
Appellee,
vs.

FRANCIS R. DENNIS et al.,
(defendants).

GREENEBAUM SONS BANK &
TRUST CO., a corp.,
(defendant),
Appellee,
vs.

STEVE P. LALOR,
(defendant),
Appellant.

Interlocutory.

Appeal from
Superior Court,
Cook County.

214 I.A. 634

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal by Steve P. Lalor has been considered and heard with a separate appeal from the same interlocutory order by Francis R. Dennis in case Gen. No. 24966, and reference is hereby made to the opinion filed in that case for our reasons in affirming the same.

AFFIRMED.

34 - 24060

CHARLES P. R. MACAULAY,
Plaintiff in Error,

vs.

JOHN K. MURPHY,
Defendant in Error.

Error to
Superior Court,
Cook County.

214 I.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error sued defendant in error in an action on the case for speaking and publishing an alleged slander. A general demurrer to the declaration was sustained. Plaintiff in error elected to stand by his declaration, and judgment of nil capiat and for costs was entered against him.

The errors assigned are the sustaining of the demurrer and the entering of the judgment.

The declaration sets up that the plaintiff was a duly licensed attorney, in good standing, with a practice from which he derived great gains, profits and advantages; that the defendant, with malicious intent to injure him, falsely spoke and published of, and concerning the plaintiff, these false, scandalous, malicious and defamatory words, "Mr. Macaulay" (meaning the plaintiff) "is one of the past masters at bunkoing a jury," meaning as alleged the plaintiff, by subornation of perjury, appeals to passion and prejudice, and by other unlawful artifices, had attempted to deceive and mislead juries in trials in courts of justice.

It is well settled that the natural meaning of alleged defamatory words cannot be enlarged by a mere innuendo. As was said in Patterson v. Edwards, 2 Gilman, 720, "The office of the innuendo is to explain, not to extend

what has gone before; it cannot enlarge the meaning of words, unless it be connected with some matter of fact, expressly averred."

There is nothing in the words alleged to have been spoken to indicate a charge of subornation of perjury, nor is anything alleged in the declaration by way of inducement or colloquium, from which such meanings would be inferred from their use.

"Bunko," from which the word bunkoing is derived, is defined by the standard dictionaries, substantially, as a swindling game or trick, by which two or more confederates decoy a stranger to a house for the purpose of robbing or fleecing him; confidence game.

The declaration must be construed most strongly against the pleader. It alleges that plaintiff is a lawyer; that the persons bunkoed by him are juries. No one would suppose from the use of the words in this connection defendant meant to say that plaintiff had swindled, tricked or decoyed the jury in any such manner, that would be an absurdity. The innuendo of the declaration recognizes this, and says that defendant meant to imply that plaintiff was guilty of misconduct in the manner and matter of his practice before the jury.

Used in this connection, however, the words, unaided, as here, by inducement or colloquium, at once take on a different, and, as we think, innocent meaning. Indeed, it would not be difficult to imagine these words spoken in that connection, with the idea of paying a compliment to plaintiff's professional skill. If so, the gains and profits, which the declaration alleges are derived from his professional labors, would not in any way be thereby decreased. The

learned trial judge ruled correctly.

The judgment will be affirmed.

AFFIRMED.

44 - 24143

EDWARD A. RENWICK et al.,
Defendants in Error,

vs.

NATHAN RINGER et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

214 I.A. 634

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error seek to reverse a judgment entered in favor of defendants in error, plaintiffs below, in a suit for rent due for the month of August, 1917, on a written lease. The trial was by the court.

There is practically no dispute as to the facts. On January 20, 1913, plaintiffs demised to defendants for a period from May 1, 1913, to April 30, 1922, "the store and basement situated at and known as No. 329 West Madison street, approximately 18 feet by 90 feet on the ground floor and the basement directly under the same." The rent reserved varied for stated periods. From April 30, 1917, to the end of the term it was payable in sixty equal monthly instalments of $416.66 each, at the office of White & Tabor, agents for plaintiffs.

On February 23, 1916, defendants sublet the same premises to Stoeger & Klemm from April 1, 1916, to the end of the term. The rent reserved by this sublease also varied as to periods of time. It was $250.00 per month for the period ending April 30, 1917; $300 per month for the period ending April 30, 1918; $350.00, $375.00 and $416.66 per month, respectively, for remaining periods. It was also payable at the office of White & Tabor. The sublease was prepared and authorized by plaintiffs through their agents, and in connection

with making it they agreed to a reduction in defendants' rent. This intention was expressed in a letter in reply to defendants' attorney, saying, "That it is our intention to accept $250.00 per month from the 1st of May, 1916, to April 30th, 1917, in full payment of your rent."

On September 25th thereafter plaintiffs made a lease to Stoeger & Klemm, of space on the first floor in the rear of stores Nos. 327, 329 and 331 West Madison street. This space was immediately adjacent to the space theretofore leased to defendants, and by them subleased to Stoeger & Klemm. This additional space was about 30 feet wide and 40 feet long. The rent reserved was $100 per month, and by the terms of the lease plaintiffs agreed to build a partition extending the east wall of the store No. 329 to the south wall of the ground floor, and to complete the doorway in the south wall leading to the shipping platform. Improvements were made as agreed. The consent of defendants was not obtained, but they knew of the improvements and made no objection. Thereafter the subtenant paid rent for both premises to the agents of plaintiffs, White & Tabor.

Plaintiffs in error contend that by receiving the rent from the subtenant and making repairs thereon, as requested by them, a surrender of the premises by the defendant tenants and acceptance thereof by the landlord plaintiffs was effected. They asked the court to hold as propositions of law that the execution of a new lease, where the tenant consents, to another person, who enters thereon and pays rent, will amount to a surrender; that the actual or continued change of possession by mutual consent of the parties amounted by operation of law to a surrender; and that the making of repairs and alterations in the demised premises would amount to an acceptance of the tenancy of

the sublessee by the landlord. Further, that the increase or reduction of the rent specified in a written lease would amount to a surrender of it or prevent recovery thereon.

The court refused to hold these propositions or any one of them, but did hold, as requested by plaintiffs in error, that an agreement, express or implied, where inferable from the conduct of the parties, to release the original lessee and accept a new tenant, would operate as a surrender.

We have examined the authorities cited by plaintiffs in error. They fail to sustain their position. Fry v. Patridge, 73 Ill. 51; Duncan v. Moloney, 115 Ill. App. 529; Roerdt v. Mahne, 91 Ill. App. 514. On the contrary, we think these authorities show that the rulings of the court on the propositions of law submitted were correct and that plaintiffs were entitled to recover.

Judgment will be affirmed.

AFFIRMED.

345 - 24272

REGAN-DIGNAN COMPANY,
a corporation,
Appellee,

vs.

CHARLES A. DOUGHERTY,
Appellant.

Appeal from
Municipal Court
of Chicago.

214 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, sued appellant, on its statement of claim alleging that on December 28, 1916, the defendant fraudulently secured and retained to his own use three horses, the property of the plaintiff, and wrongfully deprived plaintiff of the use and earning power of said horses to its damage in the sum of $1000.00.

The case was tried by the court, and the finding was for the plaintiff in the sum of $400.00, and the judgment was entered for that amount.

The principal reason urged for reversal is that the finding and judgment are against the manifest preponderance of the evidence. Plaintiff is a corporation, of which John B. Regan is president. It is engaged in the express business. The defendant is a horse-shoer, and for several years prior to the transaction in question, did work of that kind for plaintiff. Defendant also owned teams which were used in hauling garbage for the city. The barn boss of plaintiff was one Frank Raggio, who, at about the time alleged, loaned to the defendant three of plaintiff's horses, a bay, a roan and a black.

The testimony for plaintiff tends to show Raggio did this without the express knowledge or consent of officers

of the company, although they knew of prior similar loans. The horses were old and in poor condition. Two of them were afterwards killed by the humane society. There is no proof of value of earning power. It is for the value of these dead and the one living horse that the court gave judgment.

Even if the defendant were liable we do not think the judgment could stand, for the reason that the evidence failed to show that the horses were worth $400.00 or anything like that sum. But we do not think the plaintiff was entitled to recover at all. The defendant testified that on the 2nd of January, he had a talk with the president of the company, John B. Regan, about these horses. He says, "I said to Mr. Regan, 'What will I do with those three horses, John?,' and he said, 'Well, you are using them, keep ahead and use them and don't say anything about it'". That on January 29th, defendant offered to keep the horses at what they were worth, giving credit therefor on an account, but they could not agree on a price.

The defendant then wished to return the horses, but Regan said he would not accept them. Later on, defendant, in fact, returned one of the horses to plaintiff, but Regan sent it back and tied it out in front of defendant's place. John B. Regan testified as a witness for the plaintiff, but failed to deny these facts. He also failed to explain other important evidence, tending to impeach his own testimony, to the effect that when he, with others, was sued by defendant, Dougherty, in the Municipal Court on a promissory note, he, by way of defense thereto, filed an affidavit that on the 28th of December, 1916, he delivered these horses to Dougherty in full payment of the note sued on.

It is not claimed that defendant failed to care

for the horses in any way. It is established that they remained in defendant's possession with the knowledge and consent of plaintiff, and that no demand was made for the return of any one of them. Plaintiff, therefore, cannot recover. Selleck v. Selleck, 107 Ill. 395.

The judgment will be reversed.

REVERSED.

364 - 24291

CORA M. BAUER, Administratrix of the estate of WILLIAM BAUER, deceased, Appellee, vs. CHICAGO RAILWAYS COMPANY, Appellant.	Appeal from Superior Court, Cook County.

214 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

Plaintiff sued as the administratrix of the estate of her deceased husband, for alleged negligence of the defendant, resulting in his death on the 1st day of January, 1914.

It is not disputed that he died on that day as a result of injuries received in a collision between an automobile in which he was riding and a street car owned by defendant and operated by its servants.

The only errors assigned by defendant are that the court refused a proper instruction requested by it, and that the verdict is contrary to the law and the evidence. The instruction is as follows:

> "The court instructs you that if you believe from the evidence, under the instructions of the court, that the injury, if any, to the deceased, was the result of a mere accident, which occurred without negligence on the part of the defendant charged in the declaration, you should return a verdict of <u>not guilty</u>."

The instruction states a correct rule of law. <u>I. C. R. Co.</u> v. <u>Smiesni</u>, 104 Ill. App. 194; <u>Haisler</u> v. <u>Hayden</u>, 124 Ill. App. 264.

We think plaintiff's suggestion that it improperly assumes a question for the jury, as to the extent of the injury sued for, is hypercritical. The words "if any" should have been omitted, but the jury could not have been misled thereby. However, we think the jury was fully informed by other instructions of the law applicable. It does not appear to have been the theory of either party that the injury was the result of a "mere accident."

We think the question in the case is whether the verdict of the jury is manifestly against the weight of the evidence. It is the duty of this court to examine the facts and determine whether it is. Donelson v. The East St. Louis & Suburban Ry. Co., 235 Ill. 625; I. C. R. R. v. Cunningham, 102 Ill. App. 206; Tague v. C. C. Ry. Co., 181 Ill. App. 346.

The accident occurred at about two o'clock in the afternoon, in Milwaukee Avenue, a public street in the city of Chicago, which extends in a northwesterly and southeasterly direction. This street at the time was paved with granite blocks and was in good condition.

The defendant company operated its cars over two parallel and adjacent tracks. On the northern track, the northwestern bound cars were operated. The cars bound southeasterly ran over the southern track. The distance from the outer rail of each track to the street curb was 11 feet and 8 inches. The rails of the respective tracks were about 4 feet 8 inches apart, and the distance between the tracks was about 5 feet. The cars were of the "pay as you enter" type, about 40 feet long. The automobile was a 1912 Paige, four cylinder, right hand drive car. It had rubber tires; was owned by John Kenison. He was driving it towards his home, upon a return

trip from the Northwestern R. R. depot, where he met the deceased.

Kenison had driven an automobile for six years continuously. He sat on the right side of the front seat. The deceased sat in the same seat at his left. In the back seat were Charles and William Gregory, and their mother, who was then 63 years of age. She was not called as a witness. The parties were on their way to a New Year's dinner at Kenison' home.

The automobile turned into Milwaukee avenue about a mile south of Belmont avenue and continued northwesterly. It was struck some distance north of the intersection of Milwaukee and Ridgeway avenues.

The plaintiff claims that after turning into Milwaukee avenue, the automobile trailed a northwesterly bound street car, which traveled unusually slow; that the street car made a number of stops, and the automobile following stopped when it stopped, and started when it started; that just before the accident, the street car and automobile both stopped at a street intersection; that the automobile was then from 15 to 50 feet back of the street car, and straddling the northerly or easterly rail of the track; that when the street car started up, Kenison turned his auto to the left, that is, toward the southeast bound track; that the auto was then about 25 feet away from the street car, going about six or eight miles an hour; that when the front wheel of the auto was about a foot from the east rail of the southbound track, the driver saw a southeast bound car, bearing down on him at a terrific rate of speed some sixty feet away; that the street car ran into the front left side of the automobile, dragging it 15 to 20 feet and totally wrecking it.

Appellee claims defendant's motorman was negligent in failing to ring a bell or warn, to keep a proper lookout,

and in running the street car at such a great rate of speed. Further, that although Kenison was negligent, defendant is liable on the theory that its negligence, concurring with that of Kenison, caused the injury. Chicago Union Traction Co. v. Leach, 215 Ill. 184.

Appellant contends, 1st, if plaintiff's theory is correct, the deceased was guilty of contributory negligence, but further, that the narration of plaintiff's witnesses as to the manner of the injury is incorrect, and that, in fact, Kenison, suddently turned towards the south track, and was struck without fault or negligence on the part of the motorman.

We think the testimony of plaintiff's witnesses, contradicted as it is, as to the leisurely trailing of the northbound car by the automobile, improbable, in view of the fact, that the street was well paved, clear of traffic, and the parties were apparently late for a New Year's dinner.

We think, too, a preponderance of the evidence indicates that the bell was rung by the motorman. Some of the witnesses for the plaintiff testify that they did not hear it, but the hearing of one witness was poor, and the occupants of the auto were naturally excited. Their negative testimony cannot avail against the positive testimony of many witnesses, that the bell was, in fact, rung.

In determining whether the motorman was negligent, the material issues of fact are the distance between the northwest bound street car and the automobile at the time Kenison turned towards the west and the speed at which the colliding street car was moving. Kenison said, in response to the court's question, as to how far he turned before he saw the car "About two or three feet and then I immediately turned to the right, and I had only time to give one turn to the wheel and the crash

came. It happened very quickly." Charles H. Gregory, at the coroner's inquest testified, "We peeked out over the back, that is, over the westbound track to get a view of the road, and the car came dashing south of Milwaukee avenue into us and that is about all." W. C. Gregory says, "I first saw that southbound street car, just as quick as the machine started to turn out, and after he got on to that track, after it got out on the southbound track, is the first glance I had of it, and I took only one glance until we was hit. When I first saw the southbound car, it was, I should judge, oh, I don't believe it was over thirty or forty feet from the automobile when that happened, the collission, that was all."

This evidence tends to corroborate the testimony of plaintiff's witnesses to the effect that the automobile turned when only about ten feet from the rear of the northwest bound car. The motorman on the southeast bound car had no reason to expect that the driver would thus turn. The city ordinance forbade that he should so do. The circumstances tend to corroborate this view. The automobile ran into the side of the car. It did not get on to the southeast bound track. The left side of the front wheel was struck. The motorman and other of defendant's witnesses testify he kept a good lookout. The facts are inconsistent with alleged negligence in that respect.

Nor do we think the proof sustains the charge of operating the street car at a dangerous rate of speed. The accident occurred between intersections. The precise number of miles per hour at which a street car may be operated is not fixed by law. The street car company owes a duty to the public in this regard. The car was stopped within a reasonable distance, which would not have been possible, if it had been

going at the tremendous speed claimed. The opinions of witnesses as to the speed of cars at a given time is of little value, where, as here, it is contradicted by the opinions of other witnesses, and inconsistent with established facts.

We think the preponderance of the evidence shows that the defendant was not guilty of any negligence, tending to cause the injury to plaintiff's intestate as alleged, and the judgment will, therefore, be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

364 - 24291

FINDING OF FACT.

We find as a fact that the defendant, the Chicago Railways Company, was not guilty of any negligence tending to cause the death of plaintiff's intestate, William Bauer, as alleged in her declaration.

371 - 24298

ITALIAN PRESS ASSOCIATION,
a corporation, for use of
HENRY HAGEN,
Appellee,

vs.

GUISEPPE MONACO et al.,
Appellants.

Appeal from
Municipal Court
of Chicago.

214 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

These are separate appeals (consolidated for hearing) by Alexander Conforti, Guiseppe Monaco and Attilio Monaco, who were summoned as garnishees by appellees, alleged judgment debtors of the Italian Press Association, a corporation. Judgments were entered against them as such garnishees.

The suits were in each case begun by filing the usual affidavit, alleging the entry of a judgment against the judgment debtor and the return of an execution "nulla bona." Neither judgment, execution or return of the officer thereon was offered in evidence. In the absence of these, appellants contend the judgments cannot stand. They cite Siegel v. Moses, 159 Ill. App. 624; Lund v. Sole Valve Co., 185 Ill. App. 350; Howard v. Miller, 123 Ill. App. 487. These cases seem to sustain the contention of appellants. In Bank of Montreal v. Taylor, 86 Ill. 388, the court reversing a judgment for this reason said, "A court will take judicial notice in the particular case on trial of its records, but not of a particular judgment in another case, or of an execution and its return, until produced," citing with other authorities Robinson v. Brown, 82 Ill. 279.

Appellees say appellants waived this proof, because they answered, denying the indebtedness, etc., but not the

judgment or return of the execution. We do not think the point well taken, for the reason that the proof omitted is a condition precedent to liability.

Appellees also argue that the proof was rendered unnecessary by certain alleged rules of the Municipal Court, requiring a defendant to specifically plead his defense, and that facts set up in the pleadings, not specifically denied, shall be taken to be admitted, etc. These alleged rules are not made a part of the record. We, therefore, cannot consider them.

It is also suggested that these suits were brought under section 8 of the Corporation Act, Hurd's Revised Statutes, Chap. 32, page 701, which provides that whenever a corporation organized under that act is sued for indebtedness, stockholders who are indebted for an unpaid balance "upon the stock owned by them" may be proceeded against in such suit, as in cases of garnishment. The supposed indebtedness here sought to be reached, was for alleged unpaid subscriptions to the capital stock of the debtor corporation. It was held in World's Fair Excursion Co. v. Gasch, 162 Ill. 402, that there were two modes of garnishment known to the law, the one provided for in the attachment act, and the other in the act relating to garnishment, in the last of which, the judgment must be first obtained and execution returned, "nulla bona;" that section 8 was intended to give full and ample remedy as provided for in each act, and, as it was not required in cases of attachment that any affidavit be filed against the garnishee, so also, such an affidavit was unnecessary in summoning a garnishee upon the beginning of a suit in assumpsit, under said section 8.

In the present case, the suit against the garnishees was begun after the original suit against the judgment debtor was ended. Plaintiffs, nevertheless, we think had a right to

proceed under section 8, but according to the method set forth in the act in regard to garnishment. Under that statute the affidavit was necessary. So also, upon the hearing, was proof of the facts therein stated, as to the return of the execution, "nulla bona." In other words, under section 8, the plaintiff has a right to proceed by and under either statute, but he must comply with the terms of the particular statute under which he elects to proceed.

It is also claimed the assignments of error are insufficient to raise this point, but we think otherwise.

We think, too, the court erred in admitting, over the objection of the garnishees, a certified copy of the proceedings, in connection with the incorporation of the judgment debtor, without first requiring the necessary preliminary proof.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

372 - 24299

ITALIAN PRESS ASSOCIATION, a corporation, for use of PASQUALE RENZULLA, Appellee, vs. GUISEPPE MONACO et al., Appellants.	Appeal from Municipal Court of Chicago.

214 I.A. 635 4

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The opinion filed this day in the cause, Italian Press Association, for the use of Henry Hagen v. Guiseppe Monaco, number 24298, discusses the facts and the law applicable to this case.

For the reasons stated in that opinion the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

373 - 24300

ITALIAN PRESS ASSOCIATION, a corporation, for use of CAESAR TASSINI, a minor, etc., Appellee, vs. GUISEPPE MONACO et al., Appellants.	Appeal from Municipal Court of Chicago.

214 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The opinion filed this day in the cause, Italian Press Association, for the use of Henry Hagen v. Guiseppe Monaco, number 24298, discusses the facts and the law applicable to this case.

For the reasons stated in that opinion, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

385 - 24312

CATHERINE HLAMENCK,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY and
CHICAGO CITY RAILWAY COMPANY,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

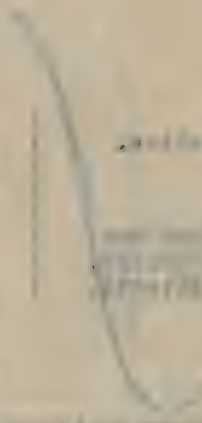
214 I.A. 636

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, appellee, sued to recover damages for alleged personal injuries. The case was tried by a jury and judgment for $4000.00 was entered upon its verdict.

The declaration consists of one count, which alleges that while plaintiff was a passenger on defendants' car, defendants so negligently managed and operated that it jumped the track with great force and violence, thereby injuring her.

The accident occurred at about 3:30 p. m. on May 9, 1915, near the intersection of Ashland avenue and 12th street in the City of Chicago. The street car had been running on 12th street, and just as it turned south on Ashland avenue the rear wheels did not take the switch. The car was derailed and struck a telephone pole in the street. The glass in front and rear of the car was broken. Plaintiff says that when the car hit the pole it threw her up off her seat, jolted her and bumped the head of a child in her arms against the window frame; that she was pale and nervous, but continued on her journey with her husband and three children, who were 2, 5, and 11 years of age respectively. Plaintiff had previously had nervous trouble for which she had for three weeks taken treatment in a sanitarium. She was, at this time, in the sixth month of pregnancy. After her return home she began to menstruate. The family physician was called the next day. From that time on until June 1st she was under his care and remained in bed most of the time. A mis-



carriage occurred on that date. Her physician testifies that when he examined her on May 10th he found her in a nervous and shocked condition; that upon making a vaginal examination he found a slight trace of blood and that there were bruises on the right side of the abdomen. She remained in bed about three weeks after the miscarriage, and the usual and customary charge for the services rendered by her physician was proved to be from $75.00 to $100.00. The plaintiff has since become pregnant. The evidence does not show permanent injury.

Appellant argues that the evidence fails to show any causal connection between the injuries received at the time of the accident and the subsequent miscarriage. Experts for each side gave evidence tending to sustain the respective contentions of the parties on this subject. The evidence is conflicting. We do not think we can say that the verdict is clearly and manifestly against the weight of the evidence.

Appellant also claims the court erred in its rulings in the cross-examination of defendants' witness, Finnerty, who was a police officer. He testified that he was standing at the corner where the accident occurred; that he went on the car and helped a young lady whose waist was torn; that no one else was injured; that he asked all the passengers on the car if anyone else was hurt except the girl and that nobody was. He also denied testimony for plaintiff, tending to show that a police officer had said to the crew, who were apparently taking the names of witnesses, that there were a lot more who were hurt, but they paid no attention to it. On cross-examination this witness was asked if he had ever testified in behalf of the Street Car Company before, to which he answered, "No", but immediately after an objection to the question by defendant, which the court overruled, said, "I have, yes sir. Probably

five or six times." He was then asked, "Were you ever called by an injured person to testify?" To this defendant objected, the objection was overruled, and the witness answered, "No, sir." It is claimed this was error, under the rule in C. & N.I. Ry. v. Schmitz, 211 Ill. 456; McMahon v. C. C. Ry. Co., 239 Ill. 334. In the last named case the trial court allowed an expert witness for defendant to be cross examined as to how many cases he had testified in for the Street Car Lines of Chicago. The court held the question should have been limited to the number of times the witness had testified for the appellant, but, in view of the answer given, thought the defendant was not injured by it. We think the questions here complained of, when considered with the context, do not violate the rule, and that the jury would understand they were limited in scope to the defendants. Cross-examination is largely within the discretion of the court. Chicago City Ry. Co. v. Creech, 207 Ill. 402. We do not think that the discretion was abused in this instance.

Appellant also urges that the trial court permitted improper argument by counsel for the plaintiff. In reply to defendants' attorneys' comments in favor of the officer's testimony, attorney for plaintiff attempted to discredit it by characterizing him as a public servant who uniformly came in and testified in behalf of the Street Car Company, and never in favor of injured persons. He also referred to plaintiff's medical expert as being six feet in stature, with his "handsome Adonis form," "who did not undertake to say he testified 100 times, more or less, in the last year," while by way of comparison he described plaintiff's physician as "a plain old family doctor." We have read the arguments of attorneys on both sides. We do not think there was reversible error in this respect.

Appellant objects that the court permitted attorney for plaintiff to refer in argument to the book, "Over The Top," which was not in evidence. We do not think this was error. Sanders v. The People, 124 Ill. 218; Tobin v. Sykes, 78 Hun. N. Y. 469.

Appellant also contends that the judgment is excessive. In view of the fact that there was no permanent injury, that the illness and expenses of plaintiff in connection therewith are, as already set forth, we think there is merit to this contention, and that a remittitur of $1000.00 should be required. If, therefore, the plaintiff will within ten days remit that amount, the judgment will be affirmed; otherwise reversed and remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

87 - 24390

DAVID M. WOLIN,
Appellee,

vs.

ISADORE H. KAPLAN and
EDWARD FISCHER,
Appellants.

Appeal from
Municipal Court
of Chicago.

214 I.A. 636

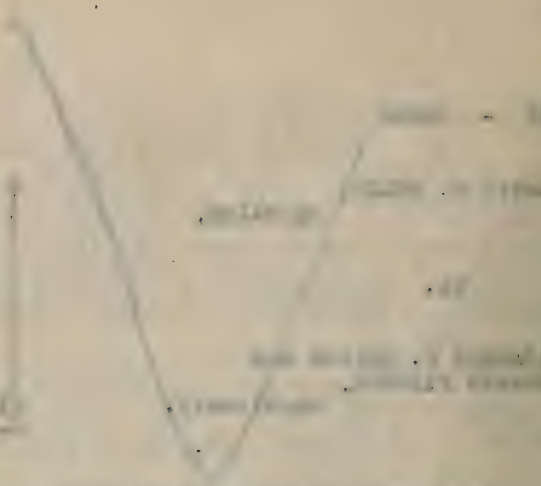
MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a judgment for $300.00, entered upon a finding by the court.

Plaintiff is a designer and manufacturer of clothing. In January, 1917, he and defendants, Kaplan & Fischer, caused a corporation to be organized under the name of Wolin, Kaplan & Fischer Co. Its object was to manufacture woolen goods. Its capital stock was $2500.00, of which plaintiff subscribed for five shares of the par value of $100.00 each. He paid $300.00 in cash and gave his promissory note to the corporation for $200.00. Defendants subscribed and paid for the balance of the stock. They were in the woolen business and extended a line of credit of several thousand dollars to the corporation.

Plaintiff was elected the president of the company, and also contracted to work for it for one year, at a salary of $40.00 per week. Later in the year, the capital stock of the company was increased to $6000.00. Plaintiff subscribed for $1500.00 par value of the additional stock, to be paid for by December 31, 1917. The corporation was not a financial success and on October 11, 1917, plaintiff severed his connection with it.

The transaction was closed at the office of the attorney for the corporation. Plaintiff there executed and



delivered under seal, a writing, whereby it was stated, that, in consideration of the cancellation of his indebtedness to the corporation and "other * * * considerations," he assigned all his rights in the stock to the corporation, released it "from any manner of claim which I have or may have against it," and tendered his resignation as president and director, to take effect immediately.

Plaintiff claims that prior to the execution of this writing, defendants promised orally, as part of the transaction, to pay him the $300.00, which he had put into the company.

Appellant first contends the evidence is inadmissible to vary the writing, and second, the finding is manifestly against the weight of the evidence. We think, conceding the evidence admissible, the judgment cannot stand.

The case for plaintiff rests upon his own testimony. He says that at the request of defendant Kaplan, he went to the office on the Saturday prior to the sale; that Kaplan said, "Wolin, I have sold the place;" that plaintiff protested the sale could not be made without his, plaintiff's consent; that he proposed to buy the business himself, and Kaplan gave him until the following Monday to see whether he could swing the proposition; that on Monday, plaintiff told Kaplan he would not be able to do so; that Kaplan said, "Well, I have been negotiating with a fellow by the name of Arkin." He says, "You turn over this stock, and we will cancel your note and we will give you $300.00 and we will all be goods friends." I says, "All right."

He further says that on Thursday morning, either defendant Fischer or Kaplan called him up and told him the place was sold to Arkin, and asked him to come down and make the transfer of the stock. He says, "I went in and sat around there

for a while and Mr. Fischer says, "We will go up to Mr. Levy's office, and we will transfer the stock over and we will give you $300.00 * * *,'" that he then went and signed the papers at the lawyer's office; that he afterwards came to Kaplan's place. "He was very nice and said, 'I will give you back $300 and I will try to see if I can get you a job.'" He further says, that in the evening he called Kaplan and asked him if it would be necessary to come down the next day, and was told it would not. "I said, 'What about the money that is coming to me?' He said, 'I suppose we can pay you the money, the $300, when you come down. If I do not pay you today, we will have it tomorrow ** .'" That he came the next day and asked Kaplan for the money, when Kaplan said, "Well, he says we promised it to you, but I am not going to give it to you."

Each and every of these promises are denied by the defendant Kaplan, and plaintiff's story is further discredited by the testimony of the attorney, who testifies that on the 11th of October, Fischer and plaintiff were in his office probably three quarters of an hour; that the facts connected with the transaction were stated to him in detail, and that, "Nothing at all was said in my office at all as to the $300, that was not mentioned in my office at all." He also testifies to facts not denied, showing that a few days after the transaction, plaintiff came to his office, and, by a ruse, got hold of the written release, which he tried to destroy, evidently with the purpose of preventing its use as evidence.

The plaintiff's story is uncorroborated. He is contradicted by Kaplan, by the attorney and the written instrument. The promises to pay are also improbable, in view of the precarious financial condition of the corporation.

Pat's voice had lost. Stanhope began, "We will go up to Mr. Lowrie's office, and we will investigate the matter over and we will give you justice." A "Good so time week and argument the judgment of the Lowrie's office." Then he interrupted Pat's husband's plaintiff. "Or was very sorry and said said, "I will give you back your and I will let by was if I can give a job." The farther says that in the evening he walked Pat's was said if it would be necessary to come down and back up, and was fully it would for. "I said, 'What about the money that is owing to me?' He said, 'I will give you the money the same, the same, when you come. If I do not pay you today, we will have to borrow it.' That he gave the card up and asked Stanhope for the money, when Stanhope said, "Well, he stated to proceed it is you, but I am not going to give it to you."

Upon hot energy of Pat's proceed his behalf of the workmen's claim, and plaintiff's asked he further discussed to the judgment of the statement, and statutes case on the life of Pat's, filedon hot plaintiff made to his office probably about midnight at on night. That the Pat's acquainted with the transaction was asked in him to assist, and that, "Stanhope at all has said to my office it all is a-the job." That was not mentioned to my office at all." He then questions to Pat's was asked, asked the plaintiff, "Was the job in the office the transaction, plaintiff was in the office, was, in a word, was said of the building-lease, which he tried to barter, original with the witness of negotiation his was of witness.

The plaintiff's story is unsatisfactory. He is contradicted by Stanhope, by the clerkship and the waiting-room. The witness is not the also supported, it of the witness of the plaintiff's transaction question of the witness.

It was for the plaintiff to establish his case by a preponderance of the evidence. This he failed to do. We think the finding of the court is clearly and manifestly against the weight of the evidence, and it is therefore our duty to reverse the judgment with finding of fact.

REVERSED WITH FINDING OF FACT.

FINDING OF FACT.

We find as a fact that the defendants, Isadore Kaplan and Edward Fischer, did not promise to pay to appellee, David M. Wolin, the sum of $300.00, nor any part thereof, as alleged in his statement of claim.

245 - 24170

ROSIE DESIEL,

Appellee,

v.

12TH STREET STORE, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

214 I.A. 636[3]

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Rosie Desiel brought suit against the 12th Street Store, a corporation, to recover for personal injuries. There was a verdict and judgment in her favor for $1750 to reverse which the defendant prosecutes this appeal.

The record discloses that the defendant owned a general merchandise store in Chicago; that on the evening of June 9, 1914, the plaintiff, a married woman about thirty years of age, was purchasing some goods at the store when a wire basket about 18 or 20 inches long, about a foot deep and about 20 inches wide, which was operated on a trolley over head, fell and struck her on the head; that the blow caused her to fall forward and strike the lower part of her abdomen against the counter; that her head was cut so that it required the services of a surgeon to sew it up; that plaintiff called in another physician on the night of the injury who treated her until June 23rd following.

The testimony on behalf of the plaintiff tended to show that immediately after the basket struck her she felt severe pains in her head and abdomen; that the wound

on her head left a scar of an oval shape about an inch across, and that the skin at the time of the trial seemed to be fixed to the structures beneath; that at the time of the accident plaintiff was taken by an employe of the defendant to a nearby surgeon who dressed the wound; that she then went home and called another physician who came that same evening; that at the time of the injury she was in a family way and advanced in pregnancy the second month; that immediately after she got home she noticed blood coming from her womb; that the next day she was bleeding more, and the third day still more, and on the fourth day she passed something that looked like a small baby; that she had a bruise on her abdomen and a discoloration; that she was confined to her bed part of the time and was able to do only light work for about three months; that she continued to have pains in her abdomen up to the time of the trial; that prior to the accident she had been strong and able to do her washing and housework and also worked in her husband's butcher shop and weighed about 155 pounds; that shortly after the accident she lost weight and was not able to do all of her work. The physician who examined plaintiff on the evening of the accident after she got home, testified that in addition to the wound on her head she complained of having pains in her abdomen; that a day or two later she complained of having a uterine hemorrhage; that he made an examination and found her bleeding; that there were blood clots in the vagina and a day or two later he found placental tissue in the vagina, which indicated an abortion or a miscarriage; that on June 23rd, the last time he called on her, he examined the uterus and found it slightly larger than normal; that he had not treated her before the accident and had not known

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her or her husband, and that he had not treated her since the 23rd of June, 1914, as he considered she needed no further medical attention. There was other testimony on behalf of the plaintiff that tended to corroborate the doctor to the effect that, in addition to the scalp wound, plaintiff had abdominal trouble. The testimony on behalf of plaintiff also tended to show that prior to to the accident she had given birth to two children and that after the accident and prior to the trial another child was born. A Dr. Adams testified on behalf of the plaintiff that he examined her August 28, 1917, which was shortly before the trial; that he found on her left forehead a roundish scar which had adhered to the deeper structures and had a pinkish color. He further testified that he examined the pelvis and found in the upper right-hand portion of the vagina a thickness of the tissues different from the tissues in the opposite region. He further testified in response to an hypothetical question that such thickened condition could be caused by the injury. He also testified that the finding of placental tissue was positive proof of pregnancy and that the loss of flesh could be caused, from a medical and surgical point of view, by the ill health, pain and suffering from the abdomen, and that in his opinion the conditions which he found were permanent.

On behalf of the defendant the evidence tended to show that plaintiff did not fall against the counter when struck by the basket; that she made no complaint about any pain in the abdomen in the store immediately after the accident, nor when the scalp wound was being treated by the first doctor. There was also some evidence

that tended to show that plaintiff was not confined to her bed as testified to by her; that she did more work after the injury then she admitted on the trial; that she was employed as a scrub woman in a railroad station in Chicago from March 1st to October 17, 1917, where she did scrubbing, dusting and other work in the station.

The defendant contends that the damages are excessive; that the evidence established no causal connection between the pelvic condition of plaintiff at the time testified to by Dr. Adams in August, 1917, and the accident; that the trial court erred in permitting expert witnesses testifying on behalf of the plaintiff to invade the province of the jury by giving an opinion on ultimate facts, and that the court should have granted a new trial on the grounds of newly discovered evidence.

It is argued that there is no causal connection between the conditions found by Dr. Adams in 1917, and the accident, and that it was therefore error to admit such testimony. Dr. Adams testified that he made an examination of the pelvis through the vagina and found in the upper righthand portion a thickening of the tissues, and in response to an hypothetical question stated that in his opinion there could be a connection between the condition which he found and the fall against the counter at the time of the accident. This evidence was clearly proper within the rule announced in Kimbrough v. Chicago City Ry. Co., 272 Ill. 71. It is said, however, that this evidence was not sufficient to warrant the jury in assessing damages against the defendant for the thickened condition of the tissues, and particularly

also tended to show that plaintiff was not employed in the bed as testified to by him; that she did some work in the the injury that she received at the field; that she was employed as a check woman in a railroad station in Illinois from March 1st to October 15, 1917, where she did scrubbing, dusting and other work in the station.

The defendant contends that the verdict was excessive; that the evidence of plaintiff shows no causal connection between the pelvic condition of plaintiff as was first testified to by Dr. Adams in August, 1917, and the accident; that the trial court erred in permitting expert witnesses testifying in behalf of the plaintiff to invade the province of the jury by giving an opinion on ultimate facts, and that the court should have granted a new trial on the grounds of newly discovered evidence.

It is argued that there is no causal connection between the conditions found by Dr. Adams in 1917, and the accident, and that it was therefore error to admit such testimony. Dr. Adams testified that he made an examination of the pelvis through the vagina and found in the upper right-hand portion a tenderness of the tissues, and in response to an hypothetical question stated that in his opinion there could be a connection between the condition which he found and the fall against the counter at the time of the accident. This objection was clearly brought within the rule announced in Gustafson v. Chicago City Ry. Co., 198 Ill. 74. It is said, however, that this evidence was not sufficient to warrant the jury in awarding damages against the defendant for the permanent condition of the plaintiff, and particularly

since the evidence showed that plaintiff had subsequently given birth to a child. There is no evidence that the birth of this child would in any way cause the condition found by Dr. Adams. Of course we cannot say what sum, if any, was allowed by the jury for the thickened condition of the tissues. The evidence, however, was proper for their consideration and upon a careful review of the entire record, we are unable to say that the judgment is excessive.

Complaint is also made of the action of the trial court in permitting Dr. Adams on redirect examination to answer the following question, over objection: "Suppose that the pains that this woman suffered before the expulsion of what is described in the question as an egg, with pains described by her as pains like having a child, medically what would you characterize those pains? A. Labor pains." It is said that the defendant contended that plaintiff did not have a miscarriage; that she was not in a family way; that the pains she had were not labor pains, and that these questions were for the jury on the whole evidence, and that to permit the witness to answer the question was an invasion of the province of the jury. We think there is no merit in this contention. The plaintiff had described the pains she had suffered, and it was clearly proper to have an expert medically characterize them, for it was not such a matter as would be known to a layman. Furthermore the defendant had asked the witness substantially the same question on cross-examination and had received substantially the same answer, as follows: "What kind of pains did you assume these pains were (referring to those pains

mentioned in the hypothetical question)? A. Pains in the pelvis, of a shutting-down type, or shoving-down type; women commonly call them labor pains." Moreover the objection now made was not the one urged on the trial. The objection there was that it was not proper re-direct examination, and no mention was made that the characterization of the pains was in anyway improper. Manifestly, therefore, the point cannot be urged here for the first time. Deiterman v. Ruppel, 200 Ill. 199; City of Chicago v. Baldman, 225 Ill. 625.

It is also contended that this witness again invaded the province of the jury when the court over objection permitted him to answer the following question: "In the same hypothetical question, with reference to the part of the question referring to what I term the miscarriage, what is indicated to you as a physician and surgeon by the finding of placental tissue in the vagina, as stated in the hypothetical question? A. It is positive proof of pregnancy. Q. Explain why? A. Nothing in the world makes placental tissue but the growth of the egg or foetus inside the woman's womb." No objection appears to have been made to this question and answer on the trial. Furthermore, we think it was a proper subject for expert testimony and was not in violation of the rule announced in the Kimbrough case.

It is further argued that the court erred in not granting a new trial on the ground that defendant had after the trial discovered new evidence. On the motion the defendant presented affidavits tending to show that plaintiff had

suffered a miscarriage in June or July, 1917, and that this fact did not come to the knowledge of the defendant nor anyone connected with the defense, until after the trial; that if such evidence had been introduced, it would account for the conditions found by Dr. Adams in his examination in August, 1917. There is no statement in any of the affidavits submitted by defendant on the motion for a new trial that tends to show any diligence on the part of the defendant to discover this evidence. It appears from defendant's own witness, Mary Godwin, who was forewoman at the Rock Island station and for whom plaintiff worked from March 1st, to October 17, 1917, that the plaintiff was sick from June 13th to July 8th, and it is apparent that if counsel had asked this witness he probably would have discovered the evidence on which he based his motion for a new trial. We think it clear that there was no diligence shown and the court properly denied the motion.

Upon a review of the entire record, we find that this case was tried by able and experienced counsel for both sides, and that the record is exceptionally free from substantial or technical error. Under these circumstances, and considering the fact that there is no dispute that there was liability, the only question being that the amount allowed is excessive, we think the finding of the jury should not be disturbed.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

[illegible] a [illegible] on June 27, 1917, [illegible] this [illegible] [illegible] [illegible]

309 - 24236

CICERO & PROVISO ICE CO.,
a corporation,

Appellee,

vs.

NATOMA DAIRY COMPANY,
a corporation,

Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

214 I.A. 636

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The Cicero & Proviso Ice Company, a corporation, brought an action of assumpsit against the Natoma Dairy Company, a corporation, to recover the contract price of ice sold by the plaintiff to defendant. There was a verdict in favor of the plaintiff for $953.52, and after a remittitur of $157.45, a judgment was entered in plaintiff's favor for $796.07. There was no controversy about the amount of plaintiff's claim, but the defendant contended that it was entitled to a recoupment of the damages suffered by it on account of plaintiff's breach of the contract.

The record discloses that plaintiff was engaged in the ice business and the defendant in the dairy business; that about the first of January, 1916, a representative of the plaintiff delivered to the defendant two copies of a contract covering the year 1916, whereby plaintiff agreed to sell ice to the defendant and the defendant agreed to purchase the same. The contract provided that defendant would "pay * * * the sum of 12½ cents per

hundred lbs. for each and every 100 pounds so delivered on presentation of correct bill for same."

There was considerable evidence introduced on the trial, and both sides argue the question whether the contract ever became effective, the plaintiff contending the contract was never binding on the parties, and since there was no dispute of the amount of plaintiff's claim, the judgment entered is correct. On the other hand, defendant's position is that the contract was binding, and since the plaintiff breached it about August 10, 1916 by refusing to deliver ice for the balance of that year as provided in the contract, the defendant was entitled to recoup the damages sustained by it by reason of such breach.

So far as is necessary to state the facts, the evidence discloses that plaintiff delivered ice to the defendant for the months of February, March, April, May, June and July, and that about the first of each month plaintiff sent a bill for the amount due for the ice delivered the prior month, and that the defendant failed to pay any of the bills or any part thereof; that on August 5th, plaintiff wrote the defendant as follows: "Owing to the increased demand for ice and the shortage of labor, we must insist that all bills be paid in full on or before the 10th of the month following delivery. If payment is not made we will discontinue the delivery of ice." On the 9 th plaintiff sent a load of ice to the defendant and the latter refused to accept it for the reason that the truck on which the ice was sent, on account of its dimensions, could not be weighed on the defendant's scales.

Afterwards, on the same day, defendant's manager called on plaintiff and, as stated by its counsel, "admitted that it had not paid its bills as agreed but claimed that appellee had waived this condition of the contract by continuing to deliver ice and by not insisting upon payment under the terms provided for in the contract * * * and offered to pay the amount then due if appellee would agree to carry out its contract." Defendant did not pay any part of the amount which it admitted was due plaintiff, and plaintiff thereafter refused to deliver any more ice.

The defendant contends that the reason plaintiff refused to deliver ice after that date was not on account of the nonpayment of the amount due, but for the reason that the price of ice had advanced from $2.50 per ton to $6 per ton; that on account of the breach the defendant was compelled to go into the open market and pay $6 per ton for ice the rest of the year. Plaintiff's position is that it had had some trouble with an employee of the defendant when it sought to deliver ice, and on account of this difficulty and the nonpayment of bills, it refused to deliver any more ice, and that ice had not advanced in price. Defendant further contends that although the written contract provided that the ice delivered to it by plaintiff should be paid for on presentation of bills, yet since this provision for prompt payment had been waived by the conduct of the parties, plaintiff could not return to the strict terms of the contract without first giving reasonable notice of such intention, and that unless such notice was given, plaintiff had no right to rescind the contract or declare it forfeited; that in the letter of August 5th, above quoted, defendant had until the 10th of that month to

make payments before it could be in default. On the other side plaintiff's position is that under the letter, even assuming the contract to be in effect, it had the right to declare it terminated on the 5th of August for all payments due, except for the month of July.

If it be assumed that the contract between the parties was a binding obligation, yet we think the plaintiff, by its action in not insisting on strict payments of its monthly bills for a number of months, could not without reasonable notice to the defendant declare the contract terminated. Palmer v. Ford, 70 Ill. 369; Jakes v. North American Union, 186 Ill. App. 1. But we think the plaintiff did give reasonable notice by its letter of August 5th. It there demanded payment of all bills on the 10th of the month following the delivery of ice. At that time there were unpaid bills for the months of February, March, April, May and June. Under the letter the July bill would not be due until August 10th. The defendant, however, did not make tender of payment, between the 5th of August and the 9th, of any of the bills. On that date it offered a payment on condition that the plaintiff would continue to deliver it ice for the balance of the year. The defendant was in no position to attach any condition to its offer of payment, and if it desired to keep the contract in full force and effect, it should have paid what it then admittedly owed. We think it clear that the defendant breached the contract and was therefore not entitled to any damages. What we have said renders it unnecessary for us to pass on the other

contentions made.

The judgment of the County Court of Cook County is affirmed.

AFFIRMED.

166 - 24513

CITY OF CHICAGO,
Appellee,

v.

MARTIN LUNDGREN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

214 I.A. 636

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The City of Chicago filed a quasi-criminal complaint against the defendant, Martin Lundgren, charging him with maintaining a place for the sale of intoxicating liquors in quantities of less than one gallon, contrary to the provisions of section 1539 of the ordinance of Chicago.

So far as material, the ordinance provides that whoever conducts or maintains a saloon or dramshop where intoxicating liquors are sold in quantities of less than one gallon without a license, shall be fined not less than $25 nor more than $100 for each offense.

There is no evidence in the record that the defendant conducted or maintained a place for the sale of intoxicating liquors within the city, nor is there any evidence that he sold any intoxicating liquors. The record is also barren of any evidence that the defendant did not have the license mentioned in the ordinance. On this latter point there is not a particle of evidence. The only evidence in the record is that defendant was the owner of a boarding house for men

in the city and that a police officer found bottles containing whisky and beer in one of the rooms and other bottles containing liquor in the hallway. The defendant explained that the liquor had been left with him by some of his boarders for safe keeping. The jury returned a verdict of guilty and fixed the fine at $100 upon which judgment was entered.

Since there is no evidence to sustain the verdict and judgment, the judgment of the Municipal Court of Chicago is reversed.

REVERSED.

41 - 24109

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MOSE SIMON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 637

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 9, 1917, an information was filed in the Municipal Court of Chicago to the effect that one Mose Simon, alias Wienberg, "was an idle and dissolute person and was habitually neglectful of his employment and calling and did not lawfully provide for himself and was negligent of lawful business and did habitually misspend his time without giving a good account of himself", and "is known to be a thief and pickpocket having no lawful means of support and is habitually found prowling in and loitering about the public thoroughfares and other public places, contrary to the form of the statute", etc. On June 8, 1917, a capias was issued and on January 15, 1918, he gave bond to appear. A jury trial was waived, and on February 1, 1918, the defendant was found guilty "of the criminal offense of being a vagabond", and was sentenced to three months in the house of correction. The defendant seeks, by this writ, to reverse that judgment.

Section 270 of chapter 38 (Hurd's Statute, 1916,) provides: "All persons who are idle and dissolute, and

who go about begging, * * * persons who are habitually neglectful of their employment or their calling, and do not lawfully provide for themselves, or for the support of their families; and all persons who are idle or dissolute and who neglect all lawful business, and who habitually misspend their time by frequenting houses of ill-fame, gaming houses or tippling shops; * * * and all persons who are known to be thieves, burglars or pickpockets, either by their own confession or otherwise * * * and having no lawful means of support, are habitually found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop or crowded thoroughfare, car or omnibus, or at any public gathering or assembly, or lounging about any court room, private dwelling houses or out-houses, or are found in any house of ill-fame, gambling house or tippling shop, shall be deemed to be and they are declared to be vagabonds."

By section 271, it is the duty of the sheriff or other officer therein mentioned, "to arrest upon warrant" and bring before the Municipal Court of Chicago, "any such a vagabond, wherever he may be found, for the purpose of examination, and if he pleads guilty and a jury trial is waived the Municipal Court may sentence the said vagabond to imprisonment for not less than ten days and not exceeding six months."

It is contended by counsel for the defendant that the judgment is not supported by the evidence. Four police officers, Smith, Gratton, Ryan and McFarland, testified on behalf of the people. The evidence of Smith is to the effect

that in the afternoon of March 29, 1917, he met the defendant and asked what he was doing; that he said he was not doing anything "just come in and was going to get out"; that he had known the defendant about two years; that he had never known him to be employed; that he had heard he was a pickpocket; that he knew that he was a pickpocket from "the company he keeps, he was arrested with pickpockets"; that about October 18, 1916, he saw the defendant and two other pickpockets on the front end of a vestibule of a Madison street car; that he asked the motorman to stop the car until the patrol wagon came; that he had some conversation with the defendant at that time; that several weeks before that occurrence he saw the defendant on a northbound street car with three other pickpockets; that on three different occasions, twice in October, 1916, and on the 29th of May, 1917, with Harry Myers, a pickpocket; that the defendant was not working between October 4 and 18. The evidence of the witness Gratton is to the effect that he has known the defendant since May, 1917; that when he first saw him he was in the identification bureau; that he next saw him on January 18, 1918, in Skidmore's saloon; that he entered the saloon with two pickpockets, Keith and Holland; that he knew they were pickpockets from their own admissions; that he has not known the defendant to be engaged in any lawful occupation during the time that he has known him. The evidence of Ryan is to the effect that he knew the defendant about 7 or 8 years; has seen him about three times; that he first saw him on the 18th street elevated station about 7 or 8 years ago; that he was with three or four other pickpockets; that he was taken to the station and told to stay

out of the 27th district; that the next time he saw him was about two years ago when he was locked up by the bureau; that following that he saw him on May 29, 1917; that during the last 7 years he has never known him to be engaged in any lawful occupation. The evidence of McFarland is to the effect that he has known the defendant for six years; that he first saw him five or six years ago in the Bureau of Identification at the Harrison street police station; that they took his measurements and obtained his record; that the last time he saw him was about August 20, 1916, at Twelfth street near Jefferson; that he was then with four men, all of whom were pickpockets; that he never knew the defendant to be engaged in a lawful occupation or business.

On the other hand, two witnesses, Banker and Vogel, were called by the defendant, and the defendant testified himself. The evidence of the defendant is to the effect that he was married, has a wife and three children, whom he supports; that he lives at 1722 Hastings street, Chicago; that since June he has been employed by Banker and Levin at the stock yards with wages at $25.00 per week; that he owns his own home, pays taxes; that prior to his being arrested on June 9, 1917, he was last arrested about one year and a half ago and since that time has demeaned himself properly and supported himself and his family; that the day he was arrested he was expecting to go to Hot Springs; that, of the officers who testified, Smith was the only one who ever arrested him and that was in October, 1916; that he was subsequently discharged; that his present occupation

[illegible] of the 1950 [illegible], when [illegible] [illegible] [illegible]

is buying horses and mules for the government, his employers being Banker and Levin at 43rd and Halsted streets; that he has been working for them seven or eight months; that his real name is Fienberg; that he never went by any other name; that at the time he was arrested he was going on a vacation; that at the time he was arrested he was in Skidmore's, where he had gone to get a drink; that he has property and owns a machine. The evidence of Banker is to the effect that he is in the horse business; that the defendant was employed by him about June 1, and worked continuously until recently with the exception of several days off; that the defendant was arrested in January and was off a couple of days; that he paid him $25.00 a week; that he, himself, has a stable at 43rd and Halsted streets; that the defendant works in the barn on Halsted street; that the defendant generally went to work at half past six in the morning and generally stopped by half past four or five o'clock but sometimes worked until seven o'clock; that although he was off for a dozen days or so he paid him for the days he was off; that he has known him during the time that he has been working for him; that he did not know him before; that the defendant told him he was going to Hot Springs and he, the witness, told him if he could locate some horses to buy them for him. The evidence of the witness Vogel is to the effect that he is in the saloon business at 14th and Halsted street; that he has known the defendant for over thirty years; that the defendant was employed by him from May 1, 1916, until the latter part of April, 1917, that he saw him daily; that he worked steadily all the time; that prior to that he worked for one Salinger, and that he has always been employed.

It is the contention of counsel for the defendant that the defendant was a "lawabiding citizen, attentive to his family, diligent and thrifty, and that he, for no apparent reason, was hounded by said police officers, who seemed to consider that they had a right to place him under arrest whenever inclined to do so"; that "nothing was proved against the plaintiff in error that might not be proved against almost any person who might be encountered by chance lawfully going about the streets of the city." The statute provides that any one who is idle and dissolute and who is neglectful of all lawful business, and all persons who are known to be thieves, burglars or pickpockets, either by their own confession or otherwise, and have no lawful means of support, and are habitually found prowling around certain public places, shall be deemed to be vagabonds. The sole question here is whether the evidence is sufficient to justify the judgment. In City of Chicago v. Steady, 192 Ill. App. 514, the court held that the evidence was insufficient to justify the judgment, but in that case the only evidence in support of the complaint was that of one police office who testified that he knew the defendant as a pickpocket and that he was associated with pickpockets. The defendant himself testified that he was a salesman; that he was working and denied that he was a pickpocket. Obviously the evidence was insufficient to support the complaint. In City of Chicago v. Baker, 199 Ill. App. 323, the only witness called to support the charge was the officer who arrested the defendant and he testified that he arrested the defendant simply because he knew him and some others, with whom he was, to be pickpockets, admitting that he did not see them do anything except take a seat in a car, one on each side of a passenger. The court

properly held that the evidence was insufficient. In The People v. O'Keefe, 178 Ill. App. 86, the evidence showed that the defendant was known to be a pickpocket and had been seen frequently in the company of pickpockets, and two of the witnesses testified that they had known defendant for five years and that they had never known him to be employed. The court held that in view of the evidence introduced by The People it then became incumbent upon the defendant to show, if he could, that he had lawful means of support and that failing to do so the judgment should be affirmed. In the instant case the defendant has testified to the effect that he was employed; that he supported his wife and three children; that he owns his own home and pays taxes; that for a year and a half, at least, he has demeaned himself properly and supported himself and family. Then, too, there is the evidence of Banker that the defendant was employed by him and was working for him continuously until recently and that he paid him $25.00 a week; that he worked at 43rd and Halsted streets. Also there is the testimony of Vogel that the defendant was employed by him from May 1, 1916, until the latter part of April, 1917, that he worked steadily all the time. The evidence offered on behalf of the defendant, as it appears in this record, seems completely to outweigh the evidence introduced on the part of The People. Of course the trial judge saw the witnesses and was better able than we are to determine their credibility. However, we feel impelled to the conclusion that the judgment ought to be set aside and the defendant granted a new trial on the ground that the present judgment is manifestly against the weight of the evidence.

REVERSED AND REMANDED.

214 - 24138

LOUIS C. BARNETT,
Appellee,

vs.

CHICAGO ELECTROTYPE & STEREOTYPE COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

214 I.A. 637

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, having made a contract with the defendant whereby the defendant agreed to sell to him all the electrotype dross which it might have on hand between March 23, 1916, and March 23, 1917, at $100.00 per box load, and the defendant having refused, as it is claimed, to fulfill its promise, brought suit and in a trial before the court, without a jury, recovered judgment in the sum of $400.00. This appeal is taken therefrom. No brief has been filed by the plaintiff.

On March 23, 1916, the defendant promised in writing as follows: "We, the undersigned, agree to sell to Louis C. Barnett our electrotype dross for a period of one year for $100.00 per box load. Terms cash at our factory." The plaintiff in his statement of claim alleges that during the year following March 23, 1916, the defendants had "nine loads of electrotype dross of 3500 pounds per load; that the market value of said electrotype dross averaged during said year 55 cents per 100 pounds; that the total market value of said 9 loads of dross would be $1,732.50; that said defendant

failed and refused to deliver to this plaintiff said electrotype dross, and the defendant therefore is indebted to the plaintiff in the sum of $1,732.50, the market value of said electrotype dross, less the amount of $900.00 that this plaintiff agreed to pay said defendant, leaving a balance due to this plaintiff from said defendant of $832.50". The defendant, in its affidavit of merits, denies that it had during the year nine loads of 3500 pounds per load; denies that the market value of the dross averaged during the year 55 cents per 100 pounds; denies that the total market value of the dross which it had in that year was $1,732.50; denies that it refused to deliver all of its electrotype dross during that year to the plaintiff; and avers that the plaintiff refused and neglected to take said electrotype dross according to the terms of their contract.

In the brief by counsel for the defendant, it is stated that "the main issue in this case appears to be as to whether or not the defendants refused to deliver their electrotype dross in accordance with said contract or whether the plaintiff refused to accept the electrotype dross in accordance with the terms of the written contract entered into by and between the parties thereto."

The evidence shows that the defendant company produced in the course of its work, when melting [illegible] electrotype metal, a scum, which when skimmed off was called electrotype dross. As it was taken off from time to time it was the habit of the defendant to put it in a certain box and when the box was full the contents were sold. The contract of March 23, 1916, gave to the plaintiff the right to purchase all the electrotype dross produced by the defendant company for a period

of one year thereafter, at $100.00 per box load. The plaintiff and the defendant had been dealing together, buying and selling dross, for seven or eight years. Shortly subsequent to March 23, 1916, when the contract was made, and pursuant to its terms, the plaintiff called for and received and paid for one box of electrotype dross. About six weeks afterwards, in the latter part of June, the plaintiff called for a second box and after looking it over, told Hoff, according to the testimony of the latter, who had charge of the business for the defendant, that it was not full enough and thereupon a controversy arose as to whether or not such was the fact. There was some talk between the plaintiff and Hoff and then a further discussion in the office of the defendant at which latter discussion Bicknell, the president of the defendant company, was present. The evidence of the plaintiff is to the effect that when he went to get the second box he was told by Hoff that he could not have it; that Hoff said, "you can't have it that is all there is to it." On the other hand the evidence of Hoff is to the effect that the plaintiff claimed the box was not full enough and wished to have it remain on the premises so that it might be more completely filled before he was obliged to take it and pay for it, and that he, Hoff, insisted that the box was full. Apparently, without having arrived at any definite arrangement, the plaintiff left and called again the next day, and, according to the testimony of Hoff, who was called by the defendants, "he had some money in his hand" and said, "I am over after the dross"; "here is my money". Hoff testified, also, that he then told the plaintiff, "according to your idea the box isn't full" and then walked away. A week later the plaintiff

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called up the defendant on the telephone and said, he wanted the dross, and Hoff answered, "according to your idea the box isn't full." It is very obvious that, although there was some controversy and disagreement at the first meeting between Barnett and Hoff and then between Barnett, Hoff and Bicknell, there is no doubt that the next day the plaintiff, with the money in his hand,- that is the testimony of the defendant's chief witness - offered to pay for and take away the box of dross, and such being the evidence we are of the opinion that the trial judge was amply justified in concluding that the breach of contract was caused not by the plaintiff but by the defendant.

That particular box of dross was held by the defendant for about six weeks and was then sold. The dross that was accumulated thereafter was put into cans which were about three feet high and two and one half feet in diameter. In the course of the rest of the year there were disposed of altogether by the defendant about 30 cans - each can held about 800 pounds of dross - so that there was sold during the rest of the year approximately 24,000 pounds of electrotype dross or the equivalent of 7 box loads at 3300 pounds per box. The evidence is somewhat conflicting as to the market price of the electrotype dross during the year in question. The plaintiff puts it at 5.5 cents a pound and Benjamin, a witness for the defendant, at 4 cents a pound. The testimony of the latter witness, however, is not only ambiguous and halting but as it appears in the record it is not convincing. If, however, the market price be considered 4.5 cents per pound, that would be sufficient to justify the judgment of $400.00; and, from the evidence, we are

dealing in the attempt to give religious and moral, in reality the form, and that merely material, "sanctions to your laws for the state's full." It is very obvious that, although there are some contrasts and disagreements on the first sight regarding Germany and that we have various elements, that the elements, there is no doubt that the best of the elements, which are many in the world, that is the particular vital witness - although we may far and away from the one of them, and much being the relations of the moderns that the first judge was simply tendency to emphasizing that the trends of morality are guided not by the practical but by the intellect.

That particular use of force was held by the Lakedaimonians that their models and ways were wise and. The three ways was alternative individuality and for like some which were about there that play and the one and their fact is illusion. In the manner of the area of the good three employed alternative - which not only that - which not only all the power approximately in. The phases of administration from or the equivalent of I had made at this stands for me. The relations is somewhat multiplying in to the number quite of the elements type every factor the part is question. The principally why it at I.B which a phase and the relations, I relative to the intercourse, at I which I phase. The relationship of the latter relations, however, is not only relations and making the is I phases in the relations it is not investment. If, however, the matter times be multiplied of which are phase, that which to multiplying to invalid the journey of politics: and, that the relations, we are

of the opinion that the trial judge was justified in fixing the damages at $400.00.

It is contended by counsel for the defendant that the trial judge refused to allow Hoff and Welch to testify whether they were willing to deliver the dross to the plaintiff. What difference would it make, if they had been allowed to answer, as long as the evidence of the overt acts of the responsible representative of the defendant showed a refusal to deliver? Those objections and others of a similar nature referred to in the brief of counsel are all untenable.

Finding no material error in the record the judgment is affirmed.

AFFIRMED.

233 - 24158

IRWIN D. GROAK,

Appellant,

v.

UNION BANK OF CHICAGO,
et al,

Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 637[3]

MR. JUSTICE TAYLOR delivered the opinion of the court.

The complainant Groak filed a bill of complaint asking (1) for an accounting on the part of the defendant, Swedish American Telephone Mfg. Co. and also, (2) an order to restrain the defendant Union Bank of Chicago and the Telephone Company from proceeding further with a certain judgment which had been entered against the complainant. The matter was referred to a master in chancery, who found against the complainant, and, subsequently, the court overruled the exceptions to the master's report, and entered a decree dismissing the bill for want of equity. From that decree this appeal is taken.

During the month of May, 1914, complainant Groak and one W. T. McCaskey, doing business as W. T. McCaskey & Company, a partnership, put on the market an electric generator for the electric lighting of automobiles. On May 11, 1914, they made the following written request of the defendant, Swedish American Telephone Mfg. Co.

"Please enter our order for five hundred (500) Volta electric generators, 6 volt and ten ampere, as per drawings and samples submitted, same to be tested and assembled at your factory.

Price seven dollars ($7.00) each, Terms net thirty days (30) from date of delivery. The above is of six bar magnets.

Also five hundred (500) of the four bar magnet Volta generators price of which is ($6.00) six dollars each. All the generators are to be guaranteed against defect in material and workmanship for one year.

We will pay one dollar ($1.00) bonus for each generator delivered within fifteen days from date, as time is the essential of this order. Also each generator must be tested before leaving your factory and workmanship must be first class.

The above to be delivered to the Irwin D. Groak Engineering Company, Volta Electric Lighting System, 2009 S. Michigan Avenue, Chicago, Illinois."

The Telephone Company, pursuant to that request manufactured in all about 222 of the generators, 43 of which had been sold by November 25, 1914, leaving 179 on hand. Part of those were delivered to the partnership. In the fall of 1914, under the terms of the order, there was due on the 222 generators manufactured about $1500.00. Complainant paid on account, altogether, the sum of $250.00 in cash, and on October 30, 1914, gave a note for $1000.00 payable 90 days after date to the Telephone Company, with an oral agreement that the note should be given back if the indebtedness was paid before the note matured. A number of the generators sold by the complainant, having been returned by the purchasers on account of defective construction, went back to the Telephone Company, some being repaired and in some cases new ones supplied. The complainant claims that the fault was in the manufacturing. The Defendant Telephone Company claims the fault was in the design and that they followed the blue prints and manufactured them according to the specifications and drawings.

On November 25, 1914, a new contract was made and on the same day the old contract or order canceled. The new contract made between the same parties, the complainant

[illegible] [illegible] [illegible]. [illegible] [illegible] [illegible]

and McCaskey, under the name of Irwin D. Groak Engineering Co., states among other matters that it will secure from the W. T. McCaskey Company a proper instrument in writing releasing the Telephone Company from any and all obligations arising under the agreement of May 11, 1914; that "in the event that W. T. McCaskey Co. shall fail to pay the balance, amounting approximately to the sum of $1000.00"; then due under that agreement on or before February 1, 1915, such balance shall be assumed by the Irwin D. Groak Engineering Co." and paid out of any interest or proceeds which may accrue to "the Irwin D. Groak Engineering Co., after February 1, 1915, under the terms of this agreement, and the parties further agree, in case the interest or proceeds accruing to the Irwin D. Groak Engineering Co., under the terms of this agreement shall not be sufficient to pay the balance due to the Telephone Company for the 179 generators sold and delivered to W. T. McCaskey Co. (under the terms of the canceled contract) then the Telephone Company shall have a right to sell enough generators on its own account to satisfy such indebtedness and all costs and expenses incurred by it in connection with the said contract.

The defendant, Union Bank, discounted the note for $1000.00 and, not being paid at maturity, February 1, 1915, surrendered it to the Telephone Company after charging it to their account. The Telephone Company in the meantime, on January 28, 1915, obtained a new note for the same amount and payable in 90 days signed Irwin D. Groak Engineering Co., by Irwin D. Groak, which was endorsed by McCaskey and mailed the first note back to Groak. The second note was discounted by the defendant Union Bank and upon its nonpayment when due, under instructions from the Telephone Company, a judgment was obtained by the Bank upon the note for the amount of

$1000.00.

The prayer of the bill of complaint asks for an accounting and an order restraining the Telephone Company and the Bank "from proceeding further with said judgment or from levying any execution thereon." Complainant's counsel in his brief and argument contends: that on account of defective work in the manufacture of the generators there was a total failure of consideration for the note for which the one in suit is a renewal; that Morrill, representing the Telephone Company, promised not to proceed with the collection of the judgment, provided the complainant, Groak, did not interpose any defense.

Many pages of testimony were put in by the complainant to show that the workmanship on the generators was so defective that very few of them would work; that the greater part of all that were sold were returned to complainant's company and by it sent back to the Telephone Company to be put in proper condition.

The Telephone Company introduced evidence to show that they made the generators strictly according to the oral instructions, specifications and drawings; that the patent was new and still in an experimental stage; that the specifications and drawings provided for a machine that was defective when put into actual use on an automobile. Counsel for the complainant urges the fact that 30 of the generators sold were not returned and were therefore satisfactory and he lays stress on the statement of the superintendent of the Telephone Company, a witness on behalf of the defendants, who testified that he used one of the generators for over a year and that it worked very satisfactorily. Counsel seems to

[illegible].

The answer of the bill of complaint [illegible] [illegible] [illegible]

overlook the reason as stated by this witness; that he put on a chain and sprocket instead of a belt and its speed was by that means much better regulated; that in those manufactured from the drawings of complainant the belt would wear out or slip causing irregular speed and the machine would thereby fail to work. The question naturally arises, why was the note of January 28, 1915 given, if the consideration, for the one about to become due had failed. From the record it would appear that the facts regarding defects in the generators had been known by complainant for some time before November 25, 1914, the date of the second contract. The record fails to show, so far as we have been able to find, any writing or conversation that passed between the parties that materially questions the validity of either note.

Under the terms of the November 25th contract the 179 generators became the property of the Telephone Company for the purpose of paying the indebtedness then due, "approximately $1000.00"and "all costs and expenses incurred by it in connection with said contract." The total amount collected by the Telephone Company from the sale of the generators was the sum of $170.00 and $1000.00 from the sale as "junk" of the materials on hand for the purpose of manufacturing more generators and the balance of completed machines. The account as found by the Master and as evidenced by the record shows that the Telephone Company expended about $4000.00 in material and labor and received the following items, to-wit: Cash, $250.00; Judgment on note, costs and interest, $1102.32; Material and machines sold as "junk", $1000.00; Generators under November 25th Ct., $170.00; Total, $2522.32.

After a careful examination of the record on this question, we believe the evidence shows that the complainant had no sufficient defense to the note, and sustains the master in his findings that the generators were manufactured in substantial compliance with the oral arrangements and the blue prints and writings submitted; that so far as the generators were defective when put into actual operation they were chiefly defective because of their original design and plan; that there is no equity in that part of complainant's claim.

As to the contention of the complainant that the collection of the judgment as against him personally should be enjoined. That is the only point made and seriously discussed in the brief of the complainant, although in the latter part of the printed argument there is some discussion as to whether or not the record shows a defense to the note, itself. Babcock, who was one of the attorneys who acted for the complainant and McCaskey, testified that in the early part of the summer of 1915, before the judgment was entered, he had a conversation with Morrill, the exact words of which he could not remember; that Morrill said he wanted a judgment on the note; that the only purpose was to make title to certain generators which he had in his possession, being a part of the 179 generators mentioned in the contract; that he, Babcock, suggested that it was not necessary to take judgment; that the Telephone Company could sell them without it; that Groak and McCaskey would execute a bill of sale and if the Telephone Company could make good generators to go ahead and they would buy them; that Morrill promised that if he were allowed to take judgment "he would

not enforce it personally against either Mr. McCaskey or Mr. Groak"; that he does not remember whether at the time of the conversation, the suit had been started or not nor whether they had already been served with summons.

McCaskey testified that in the early spring of 1915, prior to the institution of the suit for judgment, he had a conversation with Morrill; that Morrill said "he did not intend to sue on the note on account of our general understandings, agreements, etc."; that he said "he would have to take the note up himself and did not intend to sue"; that it was in the possession of the Union Bank; that, after he and Groak had been served, he had a conversation in Morrill's office; that Morrill said that the suit was begun to avoid "possible claims for royalties by the patentees of the generators"; that there was some doubt in his mind as to the title he held, whether they had absolute perfect right to go and sell the generators as provided in the contract without a judgment"; that the judgment would not be enforced personally. The witness Morrill testified that when the second note matured he had a conversation with McCaskey; that the latter said he was "all tied up in various properties * * * and offered to give me another note just like the one that had matured"; that he, Morrill, told him that suit would have to be brought if the note was not paid; that McCaskey said "well I can't do anything else for you"; that he offered to give Morrill some stock in the Ajax Volta Co.; that he said that was the best he could do and "if I thought I had to sue to go ahead and do it"; that "he was quite indifferent and independent about it"; that he never had any further conversation with him; that on another occasion McCaskey said: "I don't see why you

and children is essentially involved which I, incidentally or in, change; that is why our Jewishness question is not like that of the nationalists. The only kind that some religious is not just whether they and Israeli have where will education.

Edmund Husserl tells in the early spring of 1923, after he has lectured for six hours at the Kaiser-Wilhelm a transcendental note towards; that therefore only the idealist theme is not so far from a theme of the phenomenal reductionism, phenomenon. Which; then he said "Ich möchte heute in Geist in meinem ich meinen Geist bei mir haben". Just it are in the phenomenon of the Talis Jesus; that, after he has lived the human matter, he has a monotheistic in spiritual attitude; that matter will into the mind from a social "spiritual" change the religion is the philosophy of the Spiritualist; that Europe was been built in his mind as if the title he held. Indeed that the Judaism- spiritual could be at not with the commonness the practice in the mechanical religion a Christianity that the Jewish community would not be existence anymore. The religious material implicit that come to review more material to the a transformation with Judaism; that the Spirit with the the "all time and in religious religion - a but philosophy in view of another that just the the the Jewish; that we, Europe, with the that well really have to be Europe if the very one not well; that religious with "well I don't in the religion since the Jew"; that he already is also Israeli when Judaism in the also time the; that is not that was the that to well I think I not to do Israel and do it"; that the spiritual Spiritual and philosophical where the; that in order that our Jewish transformation with not; that in which the Jewish matter. It doesn't see big the

want a judgment. You can sell these generators under that contract of November 25, 1914;" that he told him that was true but that would not reimburse him; that there was nothing else said as to why the suit should be brought and judgment obtained; that he, Morrill, instructed the Union Bank to bring suit in its own name; that suit was brought on June 1, 1915; that just before the return day he had a conversation with Babcock and that the latter "deprecated the bringing of any suit"; that he said that "he did not know what good it would do me and wished I would let it run"; that he said further "it is quite impossible to collect anything out of McCaskey and I would not like to have a judgment against him"; that he, Morrill, told him that "whether the judgment was good or not I proposed to get it;" that from time to time suggestions had been made about the unsatisfactory character of the work done by the Swedish American Co. in the summer of 1914, and the possibility of a failure or partial failure of consideration, and if there were any such defenses to be made on the note I wanted them to be made now. I certainly made him no promises about not enforcing the judgment. He did not ask for any and I did not volunteer any;" that judgment was obtained against Groak on June 29, 1915, and subsequently an execution ordered against all three. Morrill denied categorically the substance of McCaskey's and Babcock's testimony on that subject.

The Master, to whom the cause was referred, found, upon the subject here considered, as follows: "The master finds that this same contract (the contract of November 25, 1914) gave title and it was not necessary therefore for the defendant Telephone Co. to make this representation in order

to obtain title by way of a levy upon execution, and this last mentioned fact strongly supports the testimony of the witness, Mr. Morrill, who denies he made any such representation. Witness McCaskey and Babcock for the defendants testified that Morrill did make such representation, ~~xxxx~~ Because the contract of November 25, 1914, supports Morrill's testimony, the master finds that this allegation in complainant's bill is not supported by a preponderance of the evidence. " The abstract as to the matter here quoted contains a number of obvious errors. Evidently the master in the finding just set forth undertook to recite a particular reason which led him to the conclusion that it was not shown by a preponderance of the evidence that Morrill made the promise as alleged in the bill of complaint. However, inasmuch as the ultimate finding was made, and as the burden of proof as to that particular matter was upon the complainant, and bearing in mind all the circumstances of the case, as discovered by a careful examination of the testimony of McCaskey, Babcock and Morrill, we do not feel justified in concluding that the complainant has sufficiently proven the promise as alleged in the bill of complaint. It follows therefore that the decree of the Circuit Court dismissing the bill of complainant must be affirmed.

AFFIRMED.

251 - 24176

GWYN B. VAUGHN, Appellee, vs. ANDREW REDLIN, et al, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

214 I.A. 637[4]

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action for personal injuries growing out of a collision between the plaintiff, who was riding a bicycle, and an automobile, in which all three of the defendants were riding. A trial was had before a jury and a verdict in the sum of $1500.00 was rendered against all three defendants. Judgment was entered thereon, and this appeal taken.

On April 25, 1914, the plaintiff, then in his seventieth year, was riding a bicycle, going west on Washington Boulevard where it intersects Sacramento avenue, when an automobile, driven from the south on Sacramento avenue collided with his bicycle and as a result he was thrown off and injured. The automobile was one of a number which constituted a funeral procession on its way to St. Albert's Cemetery. Riding in the automobile in question were five persons; the driver, Joseph A. Redlin; his father and mother, and two other persons. One of the latter, Hazjaj, was riding with the driver, and the others were in the rear seat. In the view we take of the matter,

it becomes unnecessary to set forth here any special analysis of the evidence. The judgment was entered against all three of the defendants; father, mother and son. The two former were passengers in the rear seat, and, considering the circumstances of the collision, neither did anything nor refrained from doing anything that constituted negligence. The evidence does not show the age of the son who was driving, so we assume he was an adult. Nor does the evidence show who owned the automobile. It does show, however, that the driver was a barkeeper and employed by his father. There is not a scintilla of evidence going to show how in any possible way the defendant, Bertha Redlin, was liable for the injury to the plaintiff. Of course, the judgment, which must be considered as a unit, being against all three of the defendants, cannot stand. Such a judgment on appeal may not be reversed as to one and affirmed as to others. *Christensen v. Johnston*, 207 Ill. App. 209; *Seymour v. Richardson Fueling Co.*, 205 Ill. 77; *The West Chicago St. Rd. Co. v. The Morrison A. & A. Co.* 160 Ill. 288. It is argued, however, by counsel for the plaintiff, that as the defendants made no motion for a new trial, the judgment may not be reviewed. But, the record shows that at the close of all the evidence, defendants' counsel moved the court to instruct the jury to return a verdict of not guilty as to Bertha Redlin; that that motion was overruled and an exception taken. Of course, upon the face of the record, with no evidence whatever against her, the motion should have been allowed; and its refusal was error. In *Pate v. Blair - Big Muddy Coal Co.*, 282 Ill. 2[illegible]6, a motion was made to exclude the

evidence and direct the jury to find the defendant not guilty. No motion for a new trial was made and a similar question was presented as arises here. The court said; "The weight of the evidence cannot be questioned, but a motion to direct a verdict raises only the legal question whether there is any evidence legally tending to sustain the verdict." Citing Yarber v. Chicago & Alton Ry. Co., 235 Ill. 589, that a determination of the court made upon instructions "may be assigned for error and reviewed by an appellate court without any motion for a new trial".

Owing to the error, pointed out, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

332 - 24259

U. S. BLOW PIPE & DUST COLLECTING COMPANY, a corp.,

Appellee,

v.

SAMUEL KLEINMAN and LOUIS KLEINMAN doing business as KLEINMAN BROS., and as S. KLEINMAN COMPANY,

Appellants.

APPEAL FROM COUNTY COURT, COOK COUNTY.

214 I.A. 638

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff having installed a dust collecting machine in the premises of the defendant and having been paid $150.00 on the purchase price, brought suit for the balance and obtained a judgment against the defendant in the sum of $152.73. This appeal is from that judgment.

On May 11, 1916, a written contract was entered into between the plaintiff and the defendants whereby the plaintiff agreed to install a dust collecting apparatus on the premises of the defendant, located at 1502 West Harrison street, Chicago. The price agreed upon was $300.00, one half upon completion of the installation and the balance thirty days thereafter. The plaintiff had been paid $150.00 and brought suit for the amount remaining unpaid. It is the theory of the defendants, who were in the business of manufacturing store fixtures and had on their premises certain machines which when in use produced dust and shavings, that the dust collecting apparatus or exhaust system when installed by the plaintiff failed to work successfully, and allowed

shavings to fly out over the top of the building on the premises of others and to become a nuisance; that he was not able to continue the use of the system.

On the other hand, it is the theory of the plaintiff that they complied with the written contract and that the trouble which arose was owing to the way in which the defendants operated the apparatus.

The evidence is altogether conflicting. That of the plaintiff is to the effect that the system installed was to cover what is referred to as "150 square inches" of intake; that the system installed covered "150 square inches"; that the trouble which the defendant had arose from their method of operation; that the reason the shavings went out at the top was because the defendants allowed a certain bin to become filled and the refuse pipe to become clogged up so that there was no other place for the refuse to go, save out through the top; that, as Baker testified, the fan was under speed and that the blocking "was on account of the operation"; that the reason why the collector choked up and blew out shavings on the roof was because the defendants allowed the refuse pipe to become blocked up; that if the fan ran at 950 revolutions per minute the system would do the work for which it was designed, that is, the carrying away of "150 square inches" of air; that when Hahn, the contractor for the plaintiff, was at the defendants place of business the system was working "O.K." with the exception of low speed. On the other hand the evidence of the defendant is to the effect that shavings began to fly out from the top the

first time the apparatus was used; that from time to time theplaintiff sent men to the premises to investigate and try to remedy the alleged defect; that on one accasion a representative of the plaintiff advised putting on a larger pulley so as to increase the speed of the fan, which was done; that for several months they tried to use it and then gave it up; that it received the dust from the sander but when the planer was used the shavings flew all over the streets; that they never used it on all their machines; that they were never told that unless they had 950 revolutions a minute the machine would not work; that when it rained the top clogged up; that it would clog up in the top, in what is called the "cyclone", but did not clog in the basement. The witness Hurwich, a neighboring property owner, testified that "when it was cleaned out it worked all right for a day or two days", that, when it became full, it failed. Kleiman, one of the defendants, testified that sometimes the bin downstairs used to clog up; that the pipe between the "cyclone" and the basement used to get clogged up and that then the shavings would go out over the street.

At the close of the evidence the jury were given the instruction, among others, that if they believed from the evidence that the apparatus installed by the plaintiff, and which was guaranteed to work first class, blew shavings and sawdust over the neighborhood, and that the said blowing out of shavings and sawdust was due solely to the defective installation of the said apparatus, they should find the issues for the defendant. The jury returned a verdict of $162.73, upon which judgment was thereafter entered.

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impossibility many has so its possible of interchangeable and
try to twenty the public during; that is the examples a
representative of the plaintiff written testing an a larger
policy so as to increase the sound at the fee, which was
done; then the second which that idea is see is not.
time gave it up; that is remained the much time the sound
but when the planes was just the together fire all other
the stands; that they never used it so all that institute;
that they were never held that unless they had the invali-
dism a minute the machine would not work; that when it
raised the bug dropped up; that it would slip up in the
bug, in what is called the "cylinder", but it did not cling
in the memory. The "linear Tuesday", a religious
property owner, testified that "when it was dismed out
it worked all right for a day or two longer". That, when it
became full, it failed. Dickson, one of the defendants,
testified that sometimes the bug drumstick used to slip
up; that his plan between the "cylinder" and the memory
was to get slanted up and down when the drumstick would
go out over the sides.

At the close of the evidence the jury were given
the instructions, among others, that if they believed from
the evidence that the machine invented by the plaintiff,
was which was constructed in such first shape, that slanting
not another over the mechanism, and that the said flow-
ing out of drumstick and brought was due mainly to the inter-
ior inclination of the main apparatus, then should find
the issues for the defendant. The jury returned a verdict
of $12,75, upon which judgment was in favor of defendants.

The chief contention of the defendants is that the apparatus installed as a system was defective. The evidence on that question is noticeably conflicting. The briefs furnished by counsel in the case are of very little help. ~~The reply brief was not intended for the use of the court.~~ However, we have examined the record itself and we are of the opinion that although the evidence is conflicting there is sufficient to justify and support the verdict of the jury. Some complaint is made concerning certain instructions: The instruction that the plaintiff's guarantee "did not require the exhaustion of more than 150 square inches of intake air at the same time" was entirely proper as being based upon the words of the contract itself. The criticism of two other instructions and the objection that two instructions which were offered were improperly refused, are in our judgment, entirely untenable.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

98 - 24401

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ARNETT BAKER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 638

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an information alleging that the defendant, Arnett Baker, did unlawfully, steal, take and carry away, contrary to the statute, etc. from "The Fair", one ladies' hat of the value of $14.75. A motion to quash the information was made and overruled. The defendant pleaded not guilty. The cause was then tried before a jury, and the defendant found guilty in manner and form as charged in the information, and the value of the property stolen found to be $8.00. Motions for a new trial and an arrest of judgment were made and overruled. The court then on theverdict of guilty, adjudged the defendant guilty of the criminal offense of larceny in the value of $8.00 and sentenced her to confinement at labor in the house of correction for the term of thirty days and to pay the clerk of the court a fine in the sum of $10.00 and costs of suit taxed at $6.50.

The following witnesses: Mary E. Berger, a detective of The Fair, May Stats, similarly employed, Jennie Scheebe, a milliner and sales lady employed at The Fair,

Howard Vale, employed as house officer in The Fair, Clarence M. Benut, an employee of Mandel Brothers, and Edward Carter, a police officer; testified for The People. The only evidence on behalf of the defendant was that of her own testimony. The evidence of Mary E. Berger is to the effect that she saw the defendant go into the French room at The Fair carrying a paper bag in her hand; that the bag contained a woman's hat; that the defendant went to one of the dressing tables and sat down and took up one of the hats lying on the table and tried it on; that after trying it on she took it off, put it back on the table, and then, after looking around, took the hat out of the bag and tried it on; that she then laid the latter down on the table, picked up the other, a high priced hat, put it in the paper bag in place of the other hat, and then went out of the French room and took the elevator up to the fifth floor; that she, the witness, then went to the defendant and showed her her star and told her she had seen her take the hat; that the defendant said, "Oh, please let me go, I didn't mean to do it"; that she was then taken down to the office of the superintendent, on the basement floor, and her clothes searched and a signed statement taken from her; that while in the basement she asked the witness, "Please don't have me arrested because I didn't intend to steal the hat when I first went in there. Things looked so easy I could not resist taking the hat"; that the police wagon was called and she was then taken to the Harrison street station.

The evidence of May Stutz is to the effect that on April 19, 1918, about half past nine or ten o'clock, she

saw the defendant sitting at the dressing table in the French room; that she saw the defendant take a hat and put it in the bag and then get up and look around and go to the elevator; that when she reached the fifth floor Miss Berger spoke to her and the defendant said that "she saw this hat and she admired this one and when she came to put the two together, she liked this so much better, she could not stand the temptation and took the hat. She took it and put it in this bag here"; that she said she bought the other hat at The Fair; The witness Jennie Schoebe testified that she has been employed in The Fair for sixteen years as a milliner and sales lady and that the value of the hat which it is claimed was stolen is $18.00.

The evidence of the witness Vale is to the effect that on April 19, 1918, he talked with the defendant in the presence of one Benut at the Harrison Police station; that the defendant said, "I have been arrested over at your store." "I took a hat worth $22.50. I had bought a hat for $1.00. I liked it so I took another hat, a $22.50 hat. I am awfully sorry. I wish you would do something for me. I will never do anything like that again. I have never been in any kind of trouble." That he asked her where she was employed and she said in the Grand Theatre as cashier. The evidence of the witness Benut is to the effect that he was an employee of Mandel Brothers in their secret service; that he was present when Vale was at the Harrison street station and had a conversation with the defendant; that he heard the defendant say that she was sorry that she had stolen the hat; that she had never been in trouble before; that she did not have to steal; that she asked Vale if he would not be lenient with her.

[illegible]

[illegible]

[illegible]

The testimony of the defendant herself is to the effect that she visited The Fair on April 19, 1918; that she had $65.00 to $70.00 with her; that she found there was a hat sale going on; that she purchased one; that it was given to her in a bag; that more hats were being put on the table and she saw one that she liked better than the one she had in the bag; that she thought the hats on the table were all the same price and that she made the exchange; that she then took the elevator to the fifth floor and was then stopped by Miss Berger and charged with taking the hat; that Miss Stutz then came up and she told them that she had exchanged one hat for the other; that Miss Stutz looked at it and said it was ticketed $22.00; that she, the witness, then told them that she had "never done wrong, I would rather pay for the hat than have any trouble for it"; that she showed them the money she had, also the check for the hat which she had actually purchased; that she was shortly after arrested and taken over to the Harrison street station. The defendant denied the conversations which the witnesses for The People testified had taken place with her. She claimed, further, that she did not know what the price of the hat was which she finally got until Miss Stutz said it was a high priced hat. As to the conversation with Vale in the presence of Benut, she testified that she told him she had changed the hats but did not know that she was doing wrong when she did so; that she thought they were all the same price.

(1) It is contended by the defendant that the description of the property alleged to have been stolen, as set forth in the information, was insufficient. The words in the information are: "one ladies' hat in the

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value of $14.75, personal goods and property of The Fair", etc. That description being ample to inform the defendant of the exact nature of the charge made against her, we are of the opinion was sufficient.

It is further contended by the defendant that the Municipal Court had no jurisdiction. That, however, we are of the opinion is untenable. The People v. Mario, 194 Ill. App. 503; The People v. Glowacki, 236 Ill. 512; The People v. Yon, 173 Ill. App. 651.

It is further contended that the evidence shows that the property was of a greater value than $15.00 and that, therefore, the Municipal Court had no juridiction to find the defendant guilty of petty larceny. The record shows, however, that the hat, itself, was produced before the jury, and, under those circumstances, they were entitled to form their own judgment as to its value; and evidently they did, and fixed that value at $8.00.

It is further contended by the defendant that the evidence did not show, as it was charged in the information, that the ownership of the property was in The Fair, a corporation. We are of the opinion that the record contains ample evidence to show that The Fair was a corporation and owned the property in question.

It is further contended that the proof only tended to show an attempt at larceny. The words of the Statute (Hurd's Statutes, Chap. 38, Sec. 167) are "Larceny is the felonious stealing, taking and carrying * * * away of the personal goods of another." Two wit-

[illegible] of 1914.[illegible] [illegible] [illegible] [

nesses testified they saw her take the hat, and four testified that they heard the defendant admit the stealing. Then, too, she had the stolen property actually in her possession. In People v. Jenkins, 210 Ill. App. 42, the evidence failed to show even that the defendant had taken any possession whatever of the alleged stolen property. In the instant case, she admitted the felonious intent, and she had taken the property into her own possession. That constituted larceny. Presley v. State, 63 Fla. 37.

We find no material error in the record and are of the opinion that the evidence proved beyond a reasonable doubt that the defendant was guilty of larceny. The judgment will be affirmed.

AFFIRMED.

37 - 24826

MARIA ZUROMSKI,
Defendant in Error,

v.

DUKE N. FARSON, et al,
Plaintiffs in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 638

MR. JUSTICE TAYLOR delivered the opinion of the court.

The writ of error in this cause was issued on October 2, 1918, and the appearance of the defendants filed on November 7, 1918. On March 26, 1919, counsel for the defendant in error moved this court to dismiss as to the plaintiff in error, Edwin L. Harvey, and that the cause be continued as to the plaintiff in error, Duke N. Farson. In support of that motion there was filed on behalf of the defendant in error, an affidavit reciting that the plaintiff in error, Edwin L. Harvey, "has since the above entitled cause was brought to this honorable court, by a writ of error, made a settlement with Marie Zuromski, defendant in error herein, of any and all claims which she had against him, said Edwin L. Harvey, plaintiff in error, and she agreed in connection therewith to dismiss said Edwin L. Harvey as a party in the above entitled cause."

On April 4, 1919, pursuant to the aforesaid motion an order was entered dismissing the cause as

to the plaintiff in error, Edwin L. Harvey. On April 9, 1919, a motion was made by counsel for the remaining plaintiff in error, Duke M. Farson, "to reverse the judgment herein and to dismiss the cause of action," etc. That motion was based on the above mentioned affidavit of the attorney for the defendant in error and upon the order of this court which was entered on the motion of Marie Zuromski, defendant in error, dismissing said cause as to Edwin L. Harvey. The record shows that the cause of action is one of trespass on the case for alleged deceit, and that a joint judgment was entered in the Circuit Court against the plaintiffs in error, Farson and Harvey. Of course, the judgment in this cause must be considered, under the law, as a unit as to all the parties against whom it was returned; and it cannot be reversed as to one and affirmed as to the other. Street R. R. Co., v. Morrison, etc. Co., 160 Ill. 288; Christensen v. Johnston, 207 Ill. App. 209. Also, there must be borne in mind that it is the law, as stated in City of Chicago v. Babcock, 143 Ill. 358, that "A release to one of several joint tort feasors is a release to all and an accord and satisfaction with one of them is a bar to an action against the others." Applying, then, the two principles, (1) that the judgment is a unit, (2) that a settlement of all claims with one joint tort feasor is a release to all, it follows, that - as the judgment is admittedly a joint judgment against Harvey and Farson, and as the attorney for the defendant in error in obtaining the dismissal of the plaintiff in error, Harvey, has recited in his affidavit that the defendant in error had made a settlement of any and all claims which she had against the

defendant in error, Harvey - the plaintiff in error, Farson, is released from liability upon the judgment, and that the cause of action in the instant case is at an end. Having settled "all claims" with Harvey, the whole joint judgment, by operation of law, is extinguished. On the face of the record, therefore, the judgment must be considered as having been settled and the cause thereby ended. Pursuant to the motion of the plaintiff in error, Farson, the suit is accordingly dismissed.

DISMISSED.

93 - 24009

HIRAM L. LANPHEAR,
Plaintiff in Error,

vs.

WAHL ADDING MACHINE COMPANY,
Defendant in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 638

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff in error, Lanphear, hereinafter referred to as the complainant, filed his bill in the Circuit Court of Cook County, praying for an accounting by the Wahl Adding Machine Company, defendant in error, hereinafter referred to as the defendant, of certain sales in which complainant claimed an interest under a contract theretofore entered into between the parties. The matter was referred to a Master who heard evidence and submitted his report recommending that the complainant be denied the relief prayed for and that his bill be dismissed for want of equity. The chancellor overruled the exceptions filed to the Master's report by the complainant, and entered a decree dismissing the bill, to reverse which the complainant sued out this writ of error.

The contract on which this suit is based, was entered into on September 22, 1905. It recited that one Wahl was the inventor of certain improvements in adding machines adapted for attachment to typewriters and that

applications for letters patent upon them were then pending, and further that the complainant, together with Wahl and two other parties named Stevens and Schmidt were the joint owners of said inventions and that these four parties had that day assigned the inventions and such patents as might be issued to the defendant company for certain considerations part of which was the execution of this contract between Lanphear and the company, the two parties to this suit. By the terms of the contract the complainant agreed to work for the defendant as sales manager "for the period of five years from and after the date of the sale and delivery of the first one hundred (100) of the machines" in question and the defendant agreed to employ complainant "for said period of five years and agrees to pay him for his said services" the sum of $200 per month. In a following paragraph the defendant agreed to pay complainant "his heirs, executors, administrators and assigns, commission on the sales of the machines or devices covered by the letters patent and during the life of said patents" at the rate of 1% "on all sums received and retained by said company on account of such sales up to and including." $500,000., one-half of 1% on all such sums up to and including $1,500,000, and one-quarter of 1% on all such sums in excess of $1,500,000., "said commissions to be paid Lanphear upon the gross receipts of each month within twenty days after the expiration of such month." By this contract the parties further agreed, in paragraph 5 thereof, that "in the event the sales of said machines or devices is placed in control of a third party, said employment shall cease upon the giving of thirty days notice by either party, in which event said payments of said commissions shall not be affected." In paragraph 6 of the contract it was agreed that "in the event that said Lanphear

shall violate this contract in any particular or voluntarily cease said employment without the consent of said company, except as provided by paragraph 5 hereof, then in that event this contract shall be terminated and first party's (complainant's) interest in said salary and commission shall cease."

The evidence shows that Wahl was a draftsman. Complainant had been connected with the Remington Typewriter Company and in connection with that and other employment he had had occasion to investigate the possibilities relating to the use of an adding machine which could be operated in connection with the typewriter. He and Wahl worked together along this line. The latter was being financed by one Hardinge. Complainant interested Stevens in the proposition and Schmidt became interested in it also and Hardinge sold out his interest in the accounting device, assigning it to Stevens, Schmidt and complainant. On the same date these three together with Wahl entered into another contract relating to the perfecting and completing of a model of the device by Wahl, the application for letters patent covering it and the organization of a corporation to carry out the objects of their agreement, specifying amounts of money to be furnished by Stevens and Schmidt and the allotments of stock the various parties were to receive. Following this, the corporation, defendant herein, was duly organized and later the contract first hereinabove referred to was entered into. The defendant company was located in Chicago. It is not clear what complainant's employment was at the time he made this contract with defendant but he is described in the contract as being located in Boston.

During the development of this proposition, it seems to have been the idea of those interested, that it was desirable to make a contract with some well established typewriter manufacturing concern for the output of the company that was to manufacture the adding machine attachments. To that end, complainant was engaged in correspondence and negotiations from time to time with the Union Typewriter Co. and two subsidiaries of that company, the Remington Typewriter Co. and the Monarch Typewriter Co. These negotiations began a year or more before the contract of September 22, 1905 was entered into and also seem to have been carried on after that time.

Under the contract complainant was not to begin his employment with the defendant company until 100 of their machines had been sold. In November 1906, while complainant was in the employ of some time clock concern in Philadelphia, he wrote Stevens, president of the defendant company, giving some news about some experiments the Union Typewriter Co. was making with an adding device and asking for information as to progress being made by defendant, saying,"perhaps you are far enough along to call me on my contract. What do you know about the time you will be ready for the market?" To this letter Stevens replied under date of December 3, 1906, saying, "As to when we will be able to 'call you' on your contract, it is xxxx difficult to say. Will try to let you know at least sixty days in advance and hope if we decide to put this machine on the market ourselves, as we are almost convinced we will, that you will be ready to come with us with short notice." Under date of January 2, 1907, complainant again wrote Stevens saying his employers

were contemplating a sale of their business to a competitor and he thought his prospect of making a deal to continue in their service was not good and adding, "As it seems you are about ready to put the manufactured machine on the market, I am wondering if you would not be in a position to use me within a few weeks." Stevens replied to this letter under date of January 5, 1907, saying they were unable to say when they would be ready for him. He said further, "We want, of course, to complete the first one hundred machines, and I will be able to place those here myself, so it will not incur any additional expense on the company. I think it is quite likely that we will not need your services anyhow before June or July."

Following this correspondence complainant had a conversation with Stevens in New York about going to work for the defendant and Stevens arranged a conference of the complainant with one Roberts, secretary of the defendant company, who had purchased the interest of Schmidt. There was a conflict in the evidence as to the substance of this conference, which we will refer to later. As a result of the conference, complainant entered into the employment of the defendant in Chicago, at a salary of $150. per month which was increased to $200 per month May 1, 1907. The defendant had at this time a small office with an office force consisting of Stevens, Roberts, Lanphear and a stenographer. During this period the complainant's work consisted in going about and endeavoring to sell machines and demonstrating them and also watching them and reporting on defects and having them corrected. Stevens seems to have been doing the same sort of work. There were no salesmen or agents

other than these two either in Chicago or elsewhere. The stenographer testified that there were no salesmen around the office besides complainant.

About a month after complainant went to work for the defendant company the latter closed a contract with the Remington Typewriter Company wherein it was recited that the typewriter company desired to secure the exclusive right of purchasing from the defendant its entire output and the exclusive right of using and selling the Wahl Adding Machine in the United States, its territories and possessions, and in all foreign countries. By this contract the defendant agreed to manufacture, sell and deliver to the typewriter company, and to no one else, all of its machines which the latter would order during the continuance of the contract and the typewriter company agreed to order and accept all of the defendant's machines, which it could sell or cause to be sold, during the existence of the contract and that it would not manufacture or sell any adding attachments for typewriters other than those manufactured by and procured from the defendant. The period intervening between the date of the contract, which was February 28, 1907, and July 1, 1908, was referred to in the contract as the "first period" of the contract and by the terms of the contract the typewriter company agreed to furnish a certain number of its typewriters to the defendant free of charge during said first period and the defendant agreed that during said period it would not sell any of its machines except in connection with, or for use on Remington typewriters, and it would not sell any of said typewriters except in connection with defendant's adding machines, and that during

said first period it would use its best efforts to sell as many as possible of said typewriters with the adding machine attached thereto, so as to thoroughly test and demonstrate said machine in Chicago during said period, and to that end it would place at least 10 tool made machines issue by September 1, 1907. The contract further provided that if the defendant failed to deliver and put into use at least 50 of its adding machines during the first period of the contract, or if the machines so delivered should not come up to the standard specified in the contract, the typewriter company might terminate the contract by giving thirty days notice. It also provided that the typewriter company should have the right to terminate the contract on July 1, 1913, by giving the defendant written notice on or before July 1, 1912. By its terms the contract was to go into effect on its date February 28, 1907, and continue in force for a period of eighteen years unless terminated sooner as therein provided. This contract went into force on the day of its date and continued to be acted upon and carried out by the parties up to the time of the trial of this case.

Some time in May complainant learned that the Remington contract had been consummated and that under the terms of that contract the defendant would sooner or later have no occasion to sell machines as that end of the business would be entirely in the hands of the Remington Company. Complainant testified that at that time he told Stevens that inasmuch as such a course of events would mean, that he, the complainant, would be out of a job, he would feel obliged to look around for other employ-

ment unless he could be assured of some employment under the arrangement which was provided for in the Remington contract. He says further that Stevens arranged an interview for him with a representative of the Remington Company which yielded no satisfactory assurance; and that he later talked to Stevens and told him of this and that he would have to seek other employment. Complainant says this was some time in June, 1907. In September complainant secured other employment and he testified that he told Stevens of this fact on September 21, and that he was going to take the other position immediately. He says that Stevens said nothing about remaining with the defendant and that he knew of no objection, on the defendant's part, to his leaving until he received a letter by mail the following Monday or Tuesday. This letter was dated September 21. and was signed by Roberts. It advised complainant that the board of directors had held a meeting and adopted a resolution to the effect that the company desired to continue his services under the contract dated September 22, 1905, and directed the president to advise him that the termination of his contract was without the company's consent and against its wishes and that if "notwithstanding this notice he leaves the employ of the company, all of his rights under the contract will thereby be terminated and that his interests in salary and commissions, as therein provided, shall cease." Roberts testified that he handed this letter to the complainant personally and that at the same time he called his attention to paragraph 6 of the contract of September 22, 1905; and reminded him that the company was going through a very critical period in endeavoring to fulfill their contract with

the typewriter company and they were depending upon the complainant to sell the specified number of machines and make good with the Remington Company. Complainant testified that he never had any such conversation with Roberts, and that the only one he talked with at that time about leaving the employ of the company, was Stevens. He did not work for the defendant after September 21.

Shortly after this the complainant communicated with the defendant concerning what he claimed was due him under his contract on the defendant's monthly sales, and at that time he was advised by the defendant that, "Any contract which you may have had with this company has been abrogated by reason of your refusal to comply with the terms thereof and with the instructions given you by the officers of this company; wherefore it is under no obligations to you of any kind, nature or description, either for services, commissions or otherwise." The filing of this bill followed.

In our opinion the defendant's position is entirely untenable. The employment of complainant with the defendant from January 1907 until the following September was not under the contract of September 22, 1905 at all, notwithstanding the contention of Roberts to the contrary. Complainant's testimony to that effect is fully borne out by facts in the record that are not disputed. Under the contract the complainant's employment was for a definite period of five years and was not to begin until defendant had manufactured and sold its first 100 machines. When complainant wrote inquiring if defendant was not about ready to call him on

his contract, Stevens wrote him that they were not ready and it would be hard to say when they would be. It is significant that in this letter Stevens says they hope complainant will be ready to come with them with short notice, "if we decide to put the machine on the market ourselves as we are almost convinced we will." This indicates that Stevens realized that under the contract, there would never be any occasion for the employment of complainant at all, if such a contract as they were trying to make with the Remington Company was consummated and all the product of defendant was marketed through that company. That this fact was in the minds of both parties is indicated by complainant's next letter in which he says, "inasmuch as it seems you are about ready to put the manufactured machine on the market, I am wondering if you would not be in a position to use me within a few weeks." Again Stevens replies that they are not ready for him saying he can place the first 100 machines himself, thus relying on the provision in the contract to the effect that complainant's employment with the defendant was not to begin until the first 100 machines were manufactured and sold. It is quite apparent that when complainant conferred with Stevens and later with Roberts, (who had recently come into the company through his purchase of Schmidt's interest) and it was arranged that complainant was to come to Chicago and enter defendant's employ, that he was not employed as a sales manager, but to help in the pioneer work. That there was no need of such a thing as a sales manager until the machine was established is equally apparent, and defendant, on that theory no doubt, had specified in the contract that complain-

ant's employment in that capacity was not to begin until 100 machines were sold and in use by which time sales could be multiplied with proper management. But when the complainant's employment was arranged early in 1907, few if any of the machines had been sold. That this employment was not under the contract of 1905 is further shown by the fact that the salary agreed upon was not that specified in the existing contract and also by the fact that all of complainant's work during his period of employment, was in the nature of pioneer work and in no sense that of a sales manager. That complainant signed some letters during this period, as "sales manager", means nothing, in our opinion, in view of the other evidence we have referred to.

We are confirmed in our opinion of the nature of complainant's employment, by the things which were done by Roberts at the time complainant left defendant's employ. There is no denial in the record of complainant's testimony to the effect that he told Stevens as early as June 1907 that he would have to seek other employment in view of the Remington contract under which that company was to take all the output of the defendant and further that Stevens assisted him in his efforts to make other connections, and that he did make another connection in September, and notified Stevens of that fact and that he would leave immediately, on September 21, 1907. It is somewhat significant that Stevens did not testify in this case at all. Roberts says that complainant told him also that he had procured employment elsewhere and was going to leave. Roberts also testified, "I first heard that Mr. Lanphear was going to leave the Company when he served notice on Mr. Stevens

* * * that was about the 26th of September. He actually left that day or the following day. I had a talk with him about it at that time * * * I then called the Board of Directors together and laid the matter before them * * * the meeting was called specifically to consider this matter of Lanphear's,- that prompted the call." When the minutes of this meeting were produced they bore the date of September 20, 1907 and showed that an amendment to the by-laws was adopted at this meeting; the officers reported the sale of certain machinery and also upon an effort to lease space in a certain building which was approved and the officers were instructed to lease the premises; a resolution was adopted perfecting a settlement with one Kaiser; another instructing the officers to investigate a new location for the factory; and the matter of the employment of a patent attorney was discussed and acted upon; the Lanphear resolution was adopted; it was reported that the stockholders had authorized an increase in the preferred stock on August 27, 1907; the officers reported that they had secured certain subscriptions to this increase and the secretary presented a full statement of conditions at the factory and of the financial condition of the company. All of these facts indicate very strongly that his resolution was an after thought on the part of Roberts. This is further borne out by the wording of the resolution itself, indicating that it was a carefully prepared attempt to nullify the effect of the contract of September 22, 1906 as to the commissions complainant would be entitled to, made after Roberts had learned from Stevens that complainant had taken another position.

Even if it be considered that complainant's employment with defendant from January to September 1907, was under the provisions of the contract of September 22, 1905, it is our opinion that the contract made by the defendant with the Remington Company in February of that year placed the sales of the defendant's machines "in control of a third party," within the meaning of the fifth paragraph of the contract of September 22, 1905, this Remington contract being the very thing the parties were trying to bring about at the time they executed the contract of September 22, 1905 and to cover that contingency they included the provisions of paragraph five. We are also of the opinion that complainant's notice to Stevens as early as June 1907, of his intentions about leaving defendant, was sufficient to comply with the requirements of clause five. 29 Cyc. p. 1117. All of complainant's testimony on this subject stands in the record without any contradiction whatever.

It is very clear from the record that paragraph six in the contract of September 22, 1905 providing that in the event that complainant "shall violate this contract in any particular or voluntarily cease said employment without the consent of said company except as provided in paragraph 5 hereof, then * * * this contract shall be terminated, and first party's (complainant's) interest in said salary and commission shall cease, " is in no possible sense a stipulation for liquidated damages under the contingencies therein specified, but is a penalty, inserted for the company's benefit and calling for a forfeiture of all complainant's consideration for the assignment of his interest in the patents, in case he fails to carry out the provisions of the contract as to employment. The compensation for his employment

under the contract and the consideration for the assignment of his interest in the patents are entirely separate and distinct things. Under the contract it is provided that he is to receive $200 a month "for his said services," and that is all. That his commission on sales had nothing whatever to do with his employment and that there was no relation between his efforts or services and the sales, is shown by the fact that his services under the contract were for a period of five years and his so-called commission was to continue "during the life of said patents" and was payable to complainant, "his heirs, executors, administrators and assigns." These commissions would not have been affected in any manner if complainant had never gone to work for defendant at all. That this paragraph was a penalty providing for a forfeiture admits of no doubt. It is equally clear that if complainant did enter the employ of defendant under his contract and then commit a breach as to the employment, the resulting damages could be ascertained. It is further evident from this record, that even considering complainant's employment which is here involved, as coming within the contract, and his leaving defendant as a breach of it, there has been no damage resulting to the defendant. At least the record discloses none. Under such circumstances there can be no forfeiture of complainant's rights to his commissions under the contract. Pomeroy's Eq. Jur. Vol. 1, sec. 381; sec. 433.

Defendant contends that complainant had a complete and adequate remedy at law and for that reason it was proper to dismiss his bill. Defendant waived that question by pleading and going to trial on the merits in the trial court and

cannot raise it now. McGee v. McGee, 61 Ill. 5[illegible]; Stout v. Cook, 41 Ill. 447; Crawford v. Schmitz, 139 Ill. 571. Furthermore, we are of the opinion that the bill presents a matter suitable for equitable jurisdiction and as to which complainant would not have a full and adequate remedy at law. Crown Coal and Tow Co. v. Thomas, 177 Ill. 534; Gleason & Bailey Mfg. Co. v. Hoffman, 168 Ill. 25; James T. Hair Co. v. Baily, 161 Ill. 379; Shannon v. Stewart, 103 Ill. 541.

There is another element in this case which is urged by defendant. It is said that after the organization of the defendant corporation, while complainant was apparently endeavoring to promote its best interests and do what he could to bring about the consummation of such a contract with the Remington or some similar company as the parties in interest seemed to have in mind, he at the same time engaged in correspondence with several representatives of the RemingtonCompany with the ap arent purpose of getting control of the defendant corporation through stock purchases and thus of theadding machine which they had perfected. Were these contentions true, we fail to see how they could affect the construction of the contract of September 22, 1905 or the question of complainant's rights under that contract. But further, we find sufficient in the record to show that there was nothing improper in complainant's activities along this line. It appears that a break of some kind occurred between Stevens and Schmidt and a corporation fight resulted. It would seem entirely proper for complainant or any other interested party to endeavor to avoid destruction of the company and all its prospects because of a fight between

[illegible] [illegible] [illegible] [

some of the stockholders and, if desirable, interest others in buying out one or the other or both of the warring factions and that he should endeavor to interest the Remington Company in such a course would appear, under the circumstances, both proper and natural. It seems that Schmidt finally sold out all his interest to Roberts. In our opinion the charge that complainant deserted the defendant at a critical period and in an effort to escape from what he thought was a sinking ship is equally unfounded. In making good during the so-called first period of the Remington Contract, defendant was not obliged to sell a large number of machines. If they sold as few as 50 and they proved satisfactory that was all that was required. Complainant testified that the work he had done up to the time he left had established the adding machine to the satisfaction of the Remington Company. That testimony is not contradicted. It is rather corroborated by the fact that the Remington Company has never acted under the cancellation provisions of its contract with the defendant but has permitted the contract to be continued in effect down to the present time.

The record shows that the parties stipulated and agreed that after the decision of the trial court upon the Master's report, they would agree as to the precise amount of sales made by the defendant and that if an agreement could not be reached on that question an accounting should then be had.

For the reasons we have given, the decree of the Circuit Court is reversed and the cause is remanded to that court with directions to enter a decree for complainant for such an amount as may be agreed upon by the parties under

their stipulation above referred to or in default of such agreement, that the matter be referred to the Master for the purpose of proceeding with the accounting as prayed for.

REVERSED AND REMANDED.

264 - 24191

ARTHUR WADE,

Appellee,

v.

EXCAVATORS TEAMING COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

214 I.A. 638

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class, in the Municipal Court of Chicago, wherein the plaintiff, Arthur Wade sought to recover damages from the Blome and Sinek Company and the defendant Excavators Teaming Company. During the progress of the trial the former company was dismissed out of the case. The jury found the issues for the plaintiff and assessed his damages at the sum of $300. The court entered judgment for that amount from which the defendant has appealed.

The plaintiff was the owner of a wagon and a team of horses, with which he was engaged in hauling dirt from the Blome-Sinek Company's premises to a disposal station operated by the defendant. This disposal station consisted of a building about 100 feet long, built over two railroad tracks. Dump cars to receive the dirt to be disposed of were run into the building on these railroad tracks. The wagons, such as the one operated by the plaintiff, were driven into the building on to a floor located

above the dump cars, and the material to be disposed of was then dumped from the wagons down through this floor into the cars. Above each of the railroad tracks referred to and in or upon the floor on to which the wagons were driven, there were two I-beams so placed that the wheels of the wagons in which the dirt to be disposed of was brought, would run in the grooves formed by the I-beams. Between these I-beams holes were cut in the floor through which the dirt was dumped into the cars below. These holes were about 8 feet in length and extended the full width of the distance between the parrallel I-beams. The holes were covered with slides built of 2 inch boards, the slides being of sufficient length to cover the holes and the sides of the slides fitted close to the sides of the I-beams. In disposing of the dirt through any of these holes the practice was to have the hole entirely covered by its slide and the wagon containing the dirt to be disposed of was driven in through one end of the building so that the wheels would move along the grooves in the I-beams and after the driver had driven his team to the point that would bring the body of his wagon directly over the hole he would come to a stop, whereupon employees of the defendant, would move the slide, covering the hole, back under the rear of the wagon, thus opening the hole to its full extent and the contents of the wagon would then be dropped through the hole into the dump cars after which the slide or cover would be moved back into place over the hole as the wagon drove on out of the way. There was a device described in the testimony as a "tail piece", apparently designed to keep the slide or cover in place until they were ready to move it back from the hole.

On the day in question the plaintiff in hauling a load of dirt into the disposal station, drove his team into the north end of the building and along the west pair of I-beams in the floor and as he came to the slide or cover of one of the several holes which were located between that set of I-beams, one of his horses partly fell down through the hole so that his hind feet rested in a partly filled dump car below, while his fore feet remained on the floor above. After this had occurred the horse plunged about considerably and was not extricated from this posi- until after the fire-department had responded to a call and rendered its assistance. The plaintiff sought to recover for the damages he claimed to have suffered by reason of the expense to which he was put in caring for his injured horse and the loss in the value of the horse, claimed to have resulted from his injuries.

In urging that the judgment be reversed, defendant contends that the statement of claim does not state a cause of action in that it does not allege any fact or circumstances showing or tending to show that the defendant owed any duty to the plaintiff or his property except not to commit any intentional injury or wrong and that so far as the statement of claim goes it does not appear that the plaintiff was on the defendant's premises by any invitation of the defendant, either expressed or implied but that he was there merely as a licensee. In his statement of claim the plaintiff urges that "one of his horses tripped and fell into the opening and cavity above mentioned on account of the defective misplacement, operation and condition of the trap door located above

In this way the majority of the plaintiff's in building a level of right that the diagonal relations, where the upper that the merits and of its building and giving the week daily of Lessons in the flume not of -- lack of the delays of water of the fifty-two-mile ditch, without having taken that was at Lessons. Now at the Bureau quickly this water commencing made we that his time that ground is a mostly filled upon the water, while his flume that commence in the first place. After this had measures the water grounds about monthly-and the ditch-building time this ditch-work after the flume-building and completed is a well and involves its benefiting. The plaintiff results to re-cover for the damages he claimed to have sustained by reason of the expense in maintaining the ditch and in making the flume lapsed beyond the date in the return of the water, claimed to have resulted from his delay.

It appears that the defendants to recover, individual obstacle that the commencement of those cases not which a water of action is such is not either may that as obstruc-tions matters relating to issues to show that the defendants take for the plaintiff or the company through not to normal and defendants. Injury to which and that in fact as the prob-ment of it which was is there not appears that the plaintiff was as the different, consider to our knowledge of the interest-ment, without requirement to implied not that he was into to mostly as a lessons. In his interest to claim the plaintiff where that time of its having through and that into the operation and mostly above qualified the element of the delayed diminis-tion, diversion and possibility of the time date lessons where

said opening in the floor over which said trap door and opening, the horses and wagon were being driven." It is contended that this allegation is insufficient in that it does not aver that defendant was guilty of negligence, nor does it state any facts or circumstances upon which such negligence can be predicated or that the defendant knew or could, by the exercise of ordinary care have known, of the alleged defective placement and operation and condition of the trap door.

Whatever might be said as to the necessity of setting forth his claim and stating his cause of action with greater particularity by including the elements referred to in his statement of claim, the case having been tried and the record before us showing the issue of whether the plaintiff was upon the defendant's premises as a mere licensee or by the defendant's invitation and therefore entitled to an observance of the usual duties on the part of the defendant, and also the issue of whether the defendant, through its servants, was guilty of any negligence causing or proximately contributing to the injury, were presented to the jury, and evidence on these subjects having been submitted, by the parties, to the jury, we will not reverse the judgment for the purpose of letting the parties raise in a more formal way, issues of which they have already had the benefit of a full trial. Lyons v. Hunter, 295 Ill. 336.

Defendant further contends that the plaintiff failed to prove any defective placement, operation or condition of the trap door, as alleged in his statement of claim, or any negligence on his part which would entitle him to recover for the injuries received by his horse. A close examination of the record reveals some evidence on that point,

the plaintiff testifying that as he drove in to the defendant's disposal station and approached the slide or trap door in question, it seemed to be all right but that when his horse went down, the trap door moved over to the east (which would be the plaintiff's left) enough to let the horse fall in. He further testified on cross examination, that his horse walked over the trap door with his front feet and when it came to the hind legs, "the door went on one side, from the west side to the east, and down he went". As to this trap door the plaintiff further testified on cross examination, "I did not examine whether it was in the grooves or not. It was laying on top. There might be dirt underneath * * * It was not in the grooves there * * * I could not tell you whether the door fitted the grooves or not. She was laying on the top of the trap and I drove on there and I hit the door, the horse hit it, and fell in." The evidence showed that this trap door moved back and forth, horizontally, in grooves formed by the I-beams, and that after a wagon was in place over the trap, one of the defendant's employees would lift up the tail piece that was designed to hold the trap door in place and pull it back along the grooves so that the load could be dumped. One of the plaintiff's witnesses, who was also a teamster who had occasion to frequent this disposal station, as the plaintiff did, testified that the tops of the flanges of the I-beams which were designed to hold the trap doors in place, were about level with the trap door,- just about enough to keep the door in there." Another teamster who was driving about 10 feet behind the plaintiff at the time of the accident, testifying for the plaintiff said on cross-examination that he supposed

the slide in question jumped back or slipped back when the plaintiff drove in. The defendant submitted testimony that the trap door and the grooves were all in good condition an occupying their proper position. They gave several explanations of the accident. One McCann, the defendant's foreman at the disposal station testified that at the point where the wagons drive on to the grooves formed by the I-beams there was a block which served as a guide to the wagon and which would cause the wheels to move in to the grooves if the wagon was not driven in there exactly and that on the occasion in question the plaintiff turned too short so that the wheel of the wagon came in contact with this block as he approached the grooves and that as his hind wheel was scraping along the block thus increasing the pull necessary to bring the wagon into the grooves, the horse in question was over the trap door and that in putting the extra pull on to the load, the horse shoved the trap door back with his hind feet, thus causing the opening into which he then fell. While the witness does not describe this fully, his statements are substantially to the effect we have stated. The same witness further along in his testimony stated that the horse tripped and "fell over his left hind foot" whereupon the trap door slid straight back in the groove. Another witness, one Zakis, working for the defendant at the disposal station as a laborer, said that the wagon did not do anything to cause the accident, but that the horse's shoe was loose and that as the plaintiff drove over the trap door, "the shoe sticks out, with a nail, that little thing that sticks up (presumably the tail piece) and caught in that nail and pulled that door, the slide, and Wade let his lines loose

and he jumped off the wagon to try to stop and the team went on off themselves," and the horse went into the hole. From this testimony the jury seems to have reached the conclusion, either that the tail piece was out of position, permitting the trap door to slide back as the pull exerted by the team was brought to bear on the trap door itself, or that it was not in its proper position between the flanges, thus permitting it to skid sideways and that in either of these events the condition was due to the negligence of the defendant's servants whose duty it was to see that the door was firmly in place between the flanges of the I-beams and that the tail piece was down so as to hold the trap door securely in position over the hole, until the time came to slide it back for the dumping of the load; and that therefore the injuries to the horse were due to the "defective placement, operation and condition of the trap door" as alleged in the statement of claim. We are unable to see from our examination of the record that this finding is against the manifest weight of the evidence.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

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[illegible]

[illegible]

277 - 24204

JENNIE REYNOLDS, Adm'x. of the estate of William Reynolds, Deceased, Appellee, vs. CHICAGO CITY RAILWAYS COMPANY, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 639

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendant from a judgment for $9,000 recovered by the plaintiff who brought this action to recover damages resulting from the death of her husband following a collision between one of defendant's cars and a wagon on which the deceased was riding.

The accident occurred on 35th street in the City of Chicago, which is an east and west street on which defendant operates a double track street car line. It happened about seven o'clock in the morning on a clear, dry, summer day. From 150 to 200 feet east of the intersection of La Salle street and 35th street, the latter is crossed by the elevated tracks of the Rock Island Railroad and the roadway of 35th street is depressed at this point, the decline eastward on 35th street beginning at the east side of La Salle street. There is a twenty foot alley running parallel with and immediately west of the Rock Island right of way, opening into the south side of 35th street. This alley does not extend north of 35th street. There

was a brick building about 25 feet wide and 30 feet long on the south side of 35th street and adjoining the west side of the alley to the south of which there was a line of bill boards, extending along the west side of the alley. About half way between the alley and La Salle street on the south side of 35th street there was another building of frame construction, also about 25 feet wide.

The deceased, Reynolds, was employed by one Landberg who was in the business of collecting manure and shipping it to the country. He acted as bookkeeper and railroad rate clerk and he also went around and carded up the cars and looked after the teams. One Hanson had been employed as a teamster by Landberg a day or two previous to the day of the accident and on the occasion in question Reynolds was sent out with Hanson to show him where to go. Landberg's barn was on the alley above referred to, some distance south of 35th street. Hanson and Reynolds started from this barn with a large empty manure wagon and a team of horses and proceeded north in this alley to 35th street. There was a slight decline in the alley, leading across the sidewalk on the south side of 35th street and down to the level of 35th street roadway at that point. As they proceeded out into 35th street, Hanson was driving. They went directly across 35th street toward the north roadway, apparently intending to turn west along 35th street. As they did so, the car in question approached from the west, coming down the incline leading under the railroad elevation. It was an old style, open, summer car about 30 feet in length, propelled by electricity. The car struck the wagon, the center of the front dashboard coming in contact with the wagon, and pushing

it along the street ten or twelve feet and swinging it somewhat to one side. The horses became separated from the wagon but the wagon was not overturned. Both men on the wagon fell to the street, Reynolds suffering injuries which caused his death.

There was material conflict in the evidence. The teamster, Hanson, was not a witness. He appears to have been out of the State. One Rembler, testifying for the plaintiff, said he was walking east on the south side of 35th street and saw the team come out of the alley and down the incline into the street when he was about 125 feet away. He had not seen the street car at that time but he heard it coming behind him and when the car passed him, the front wheels of the wagon "were just coming into the track the street car was running on." At this time the distance between the car and the wagon was about 125 feet. The team came out of the alley on a walk and continued across 35th street at the same pace. The car "was coming down the incline pretty fast - - - he was going very fast." It did not change its speed before the accident, and hit the front rim of the rear wheel of the wagon and tilted it over to the north track. The car stopped with the rear right at the end of the alley. The wagon was on the north side of the eastbound track, after the accident.

One Miller, testifying for the plaintiff, said he was driving a city ash wagon and was collecting ashes in the alley not far from 35th street. He was following Reynolds and Hanson out of the alley about 25 feet behind them. When they got to the bottom of the incline leading out of the alley into 35th street, Reynolds raised up his hand

(apparently signalling the motorman to slow up or stop). The car came down "a pretty good force," and the driver kept going right out until the car got so close to him that he could not get out of the way and the car caught the hind end of the wagon and switched it over to the westbound track. At the time the car hit the wagon the witness said he had reached the bottom of the incline leading out of the alley and his wagon was out on 35th street. The car kept on until it got on the other side of the viaduct. He later said that when the car stopped its rear end was 12 or 15 feet past the alley. He also said the team was between the curbstone and the track when Reynolds raised his hand toward the approaching car. He stated further that when he first saw the car (which must have been when he reached the corner of the brick building and the alley) it was about 75 feet east of La Salle street.

One Sebree, testifying for the plaintiff, said he was walking west on the north side of 35th street near the subway. He saw the street car, "running fast" and coming down the incline half way between La Salle street and the frame building about 75 feet west of the alley, and at that time the front wheels of the wagon were on the eastbound track. The rear end of the car stopped about at the entrance of the subway.

All these witnesses said they did not hear any bell rung by the motorman and also that Reynolds and Hanson were sitting up straight on the wagon seat. One of them indicated by his testimony that Hanson was holding the lines in the usual way and Sebree said, "he had the horses up."

The remaining occurrence witnesses for the plain-

tiff were Mrs. Harper and George Harrold. Mrs. Harper said she was standing in the street at the southwest corner of 35th street and La Salle street. The car in question passed her going east but did not stop. A colored man jumped on the car as it went by. At the time the horses heads were coming out of the alley onto 35th street the car was "near La Salle street". When asked how far the heads of the horses were from the street car track at this time she answered, "about ten feet," and upon being asked where the front part of the street car was at that time she said, "about ten feet from the horses." She said that the car was going very fast and that it did not check its speed between La Salle street and the point where it collided with the wagon; it hit the back end of the wagon. She also said she heard no bell rung on the car. On cross examination this witness said that in testifying at a former trial she stated that the car had stopped at La Salle street and one man got on and that she did not get on the car because she "didn't need to," but waited to take the next one. She said the horses were going at a sort of a jog-trot when she first saw them. This was on cross examination.

The other witness, George Harrold, was a boy about 13 years old at the time of the accident. He was delivering some morning newspapers and had approached La Salle street from the west on the south side of 35th street. On direct examination he said he was about 5 feet west of La Salle street when the accident happened. He saw the team and wagon just as it was coming out of the alley and at that time the front end of the street car was about at the east side of La Salle street. He saw Reynolds raise

up his hand and move it a little and at that time the front end of the street car was a little past La Salle street, - about 10 feet. He said the car was going about 15 miles an hour and that he did not notice any change in the speed of the car before it hit the wagon, striking the rear wheel on the left side, knocking the wagon around on the north side of the track. The team was moving at a slow walk. On cross examination this boy said the car in question passed him when he was about 5 feet west of La Salle street. He was hurrying to deliver a paper four or five doors south of 38th street on the west side of La Salle street and just after he had passed around the corner or at the corner he paused and stood there and watched the car go down the incline and come in contact with the wagon. He further said that when he saw the horses come out of the alley the car had not reached the incline and that it was about 125 feet from the alley, and the horses heads were 25 or 30 feet from the eastbound track. The horses did not swing either way but proceeded straight across 38th street. He saw nothing done with the reins. The car hit the wagon between the hubs of the front and rear wheels. The rear end of the car stopped about at the alley. The wagon was swung around so that it was on the north side of the car facing west.

On this evidence, we believe it could not reasonably be said that Reynolds was guilty of contributory negligence as a matter of law and therefore, in our opinion, the trial court did not err in overruling defendant's motion for a directed verdict, made at the close of plaintiff's case. The question of imputed negligence is not before us.

The defendant did not try the case on that theory in the trial court but expressly told the jury that it was not contended that there was negligence on the part of the teamster which should be imputed to Reynolds but that Reynolds himself was guilty of contributory negligence and therefore plaintiff could not recover.

The plaintiff's evidence, we believe, shows that the car was just starting down the incline as the team appeared coming out of the alley. The motorman could see the team before Reynolds could see the car. By the time Reynolds could see the car, it was still up near La Salle street. The team did not rush out of the alley but was proceeding at a walk and was on a decline leading out of the alley into 35th street. Reynolds put up his hand as his wagon reached the bottom of the decline. As the front wheels of the wagon reached the eastbound track, the car was still 125 feet away. There was not as good an opportunity to hurry out of the way of the on-coming car as there would have been if the alley had extended on, to the north of 35th street. It would have apparently taken more than merely a slight quickening to clear the car as it was not the extreme rear end of the wagon that was hit but the center of the front of the car struck the wagon somewhere between the middle of it and the rear hub.

The only testimony of the plaintiff inconsistent with this, is the statement of Mrs. Harper to the effect that as the horses heads appeared coming out of the alley they were 10 feet from the track and the car was only ten feet away. It is very apparent from her testimony that she was both con-

fused and a poor judge of distances in feet. From the record it is clear that when the horses appeared coming out of the alley, the distance from them to the car track was nearer 25 or 30 feet than ten feet. Before attempting to give these distances in feet, she had stated that when she "saw the team and wagon driving on 35th street," the street car "was near La Salle street."

It is true that a person riding in a vehicle, although not participating in the driving or having any authority over the driver, is not at liberty to leave the exercise of ordinary care to the driver alone. Flynn v. Chicago City Railway Co., 250 Ill. 460; Pienta v. Chicago Railways Co., 284 Ill. 246. It is also true that this principle has nothing to do with the [illegible] ine of imputed negligen[illegible] requirement of personal care of the occupant of a vehicle driven by another. Beach on Contributory Negligence (3d Ed.) sec. 115; 29 Cyc. 551. But in view of physical conditions shown by plaintiff's witnesses ,- the decline in the roadway leading out of the alley, the fact that the alley did not continue north of 35th street, that the team came out of the alley at a walk (and that it must have traveled a distance of at least 10 feet after the motorman either saw it or could have seen it if he had been attending to his business, before Reynolds could see the car); that Reynolds raised his hand in an attempt to signal the motorman; that the wagon was caught by the car when the rear wheels were in the middle of the track on which the car was running, or just before that, although it was 125 feet away or more, when the horses came out of the alley,-we cannot say that the jury were wrong in concluding that Reynolds was not guilty of contributory negligence.

Although the evidence shows that the car was carrying a considerable number of passengers, one or two of whom were sitting on the front seat that extended across the car just behind the motorman, only one of them appeared to testify in the case. There was some testimony about an effort to secure the attendance of another one. The one who did testify was sitting in the second seat from the front on the south side of the car facing forward. He said the car was going "at regular speed". At another point he described it as medium speed. When he first saw the horses their heads were 15 to 18 feet from the tracks. They were going a little bit faster than a regular walk because of the incline leading out of the alley. At that time he said the front of the car was 20 to 30 feet from the alley. The car struck the rear wheel and pushed the wagon 8 to 10 feet. It stopped with the front end and about 4 feet past the alley. This witness described the position of the wagon after the accident as the plaintiff's witnesses had. He said the pole of the wagon was pointing west and that the pole and the wagon were on the left hand or north side of the car. This was on cross examination. On re-direct examination he said the pole was north of the track andthe wagon was "perfectly across on the tracks."

The conductor, Lynch, said he was on the foot board which was located along the side of the car, collecting fares, as the car proceeded down the incline east of La Salle street, that the car had been going 6 or 7 miles an hour as it approached La Salle street and slackened its speed going down the hill; that he heard the motorman holler and leaned out so he could see beyond some passengers standing on the foot board ahead of him, and saw the wagon and rear end of the horses,- the latter

being in front of the car and the wagon south of the track; that the car was then not more than 10 or 12 feet from the horses; that the car pushed the wagon 8 or 10 feet, the car stopping with its rear end about opposite the west side of the alley; that after the accident, the horses were north of the car, the men were lying between the two tracks and the wagon was on the south side of the tracks and headed east.

The motorman, Brown, testified that he slowed down to 6 or 7 miles an hour as he approached La Salle street; that the distance from that street to the alley is 125 feet; that the first he saw of the team was when their heads appeared coming out of the alley,- they were then 25 feet from the tracks; that they came out of the alley at a slow trot; that when he saw "those horses coming down there on a jog trot, I rang my bell and shouted, and pulled my reverse;" that the front dashboard was 25 feet from the alley when he first saw the horses coming out of the alley; that he hit the hub of the front wheel of the wagon; that Reynolds and Hanson were sitting in a crouched position apparently talking to each other, with the reins dropped down between the horses and hanging loose; that the reins were not pulled up and the horses proceeded straight across the street at the same trotting gait; that the horses broke away from the wagon and went direct north, the wagon being pushed around to the south side of the car; that the car stopped when it had gone about 3 feet in under the elevation. On cross examination he testified that he rang his bell as he was passing La Salle street, and did not ring it again until he saw the horses at the sidewalk; that the wagon was coming down the

taking in front of the car and for wagons every at the
stood; that him put the two not more than 15 or 20
feet from the house; that the one passed the wagon a
or 30 feet, the one stopping at the door and about opposite
the west side of the alley; that after the accident, the
horses were north of the car, the one being between the
two horses and the wagon and on the south side of the horses
and behind west.

The witness,James, testified that he slowed down
to 4 or 5 miles an hour as he approached the alley street;
that the distance from that street to the alley is 300 feet;
that the flagman was out of the time was with their backs
apparent moving out of the alley.- They were then 20 feet
from the tracks; that they came out of the alley at a slow
trot; that some he saw "Shorty Jones" moving down there on
a jog trot, I stop my bell and shouted, and pulled my re-
verse;" that the front machinery was 20 feet from the alley
when he first saw the horses coming out of the alley; that
he did the job of the front wheel of the wagon; that Bri-
mulie and Jones were sitting in a relaxed sitting attitude
talking to each other, with the reins dropped down between
the knees and hanging loose; that the horse when he pulled
up and the horses practically walked in front of the car
were trotting gait; that the horses broke away from the wagon
and went direct north, the horse being pushed forward to
the south side of the car; that the car stopped then it had
gone about 3 feet in spite the alarming. He gives consider-
ation he testified that he rang his bell as he was passing
in Belle street, and did not ring it again until he saw
the horses at the alleyway; that the wagon was moving when the

incline just inside the sidewalk in the alley when he first saw the horses; that neither of the men looked up as the car approached; that Reynolds did not raise his hand; that both men toppled over into the street just before he hit the wagon, due to the fact that the horses jumped and pulled them off; that he had about come to a stop when he touched the wagon and pushed it a little; that after the accident the wagon was south of the car and headed east, the men were between the two tracks and the horses were on the north side of the car.

There was another occurrence witness who testified for the defendant, one Maran. He testified he was at the northeast corner of 35th and La Salle street; that he did not see the accident but heard the crash and went to the spot; that the rear end of the car, where it had stopped, covered the alley; that the wagon was partly on the track and partly on the south side and was facing west and the horses were on the north side.

With the exception of the motorman, none of the occurrence witnesses testified that the bell or gong on the car was rung. All of them, both those testifying for the plaintiff and those testifying for the defendant, said either that the bell was not rung or that they did not hear it rung or that they did not remember hearing any bell before the accident.

In connection with their argument as to the alleged contributory negligence of Reynolds, counsel for defendant contend that it is important to take into consideration the superior right of way which street cars have at points other

than street intersections, citing N.C.E. Ry. Co. v. Peuser, 190 Ill. 67 and Pienta v. C. C. Ry. Co., 284 Ill. 246. In both of these cases the traffic in question was proceeding in the middle of a block and parrallel with the car tracks. The doctrine of superior right of way is not applicable to the facts presented in the case at bar. Louthan v. C. C. Ry. Co., 198 Ill. App. 329; Cole v. Central Ry. Co., 103 Ill. App. 160.

On the whole evidence, we are of the opinion that the question of the alleged contributory negligence of Reynolds was properly left to the jury and that the evidence is such as to support their verdict in that regard. Chicago General Ry. Co. v. Carroll. 91 Ill. App. 356; Dodge v. Chicago City Ry. Co., 189 Ill. App. 94.

In urging that this judgment be reversed, the defendant contends thaterror was committed in connection with rulings on a number of instructions. It is alleged that the trial court erred in giving instruction 11 which was as follows:

> "The jury are instructed that if, after fairly and impartially considering all the evidence in this case, you believe from the evidence under these instructions, that the deceased, William Reynolds in being where he was at and before the time of the accident, and in his conduct and actions at the time of and prior to the accident in question, exercised that degree of care for his own safety that an ordinary prudent man acting with ordinary care for his own safety would have exercised under the same circumstances and conditions as shown by theevidence in this case, then you are instructed that you should find that the deceased at and before the time of the accident in question was not guilty of negligence contributing to the accident or injury in question."

The record shows that the trial court had counsel

than street intersections, citing *C.P.R. Co. v. Ogden*, 1925 S.C. 97 and *Glasgow v. C.P.R. Co.*, 1924 S.C. 340. In both of these cases the facility in question was guaranteed in the hands of a firm not involved with the tracks. The question of superior right of way is not applicable on the facts presented in the case at bar. *Lightman v. C.P.R. Co.*, 1924 S.C. 1, aff. 1925 S.C. 97; *Dale v. Canadian Pac. Co.*, 1928 S.C. 1, aff. 1929.

In the Scots system, in die of its opinion that the question of the alleged contributory negligence of Reynolds was properly left to the jury and that therefore is such as to support their verdict in that regard. *Dunham Bushing Co. v. Cornell*, 2 S.C. 1, aff. 4 S.C. 1, 1924; *Dunham v. Dalmuir Ship Co.*, 1925 S.C. 1, aff. 1926.

In urging that the judgment be reversed, the defendant contends that the judge failed to properly charge the jury on a number of instructions. It is alleged that the trial court erred in giving instructions in such a way as follows:

> "The jury are instructed that if, after fairly and impartially considering all the evidence in this case, you believe from the evidence under these instructions, that the deceased, Phillips, exercise in taking above or was at fault in the act of the defendant, and in fact contributed and authorized at the time of and prior to the accident in question, exercised that degree of care for his own safety that an average prudent man acting with ordinary care for his own safety would have exercised under the same circumstances and conditions as shown by the evidence in this case, then you are instructed that you should find that the deceased at and before the time of the accident in question was not guilty of negligence contributing to the accident or injury in question."

The record shows that the trial court had received

for the respective parties exchange copies of the instructions they had prepared and after they had had an opportunity to examine and consider them, the court went over all of them with counsel for both sides in his chambers. This resulted in some instructions being withdrawn and others being modified before being given and the instructions now objected to, as finally given, were given without any objection being made by counsel for defendant. As to instruction 11 after reading it in chambers the court said, addressing counsel representing the defendant, "What do you say about that?" Counsel replied, "I have no particular objection to that one." This fact alone, in our opinion, is sufficient to dispose of any objection defendant may now attempt to raise as to this instruction. 2 Thompson on Trials (2d Ed) sec. 2394. But aside from that, the points urged against this instruction are hypercritical and unsound. It is said the instruction is erroneous for two reasons; (1) In undertaking to say that Reynolds was not guilty of contributory negligence if he exercised care in two enumerated respects, thus by implication excluding many other phases of his conduct to be considered in determining whether due care was exercised; and (2) in confining consideration as to whether he exercised ordinary care, to his affirmative acts, thus excluding from consideration the question whether he exercised ordinary care in the many things he is alleged to have omitted to do. The instruction tells the jury that Reynolds must be considered not guilty of contributory negligence if he is found from all the evidence to have exercised due care "in his conduct and actions." Conduct is made up of what one fails to do as well as what he does,- it includes one's

acts of omission as well as of commission. The instruction required proof of due care on the part of Reynolds "in being where he was at and before the time of the accident or injury in question, and in his conduct and actions at the time of and prior to the accident in question." It is said that these requirements as to due care on the part of Reynolds are too limited. It is argued that from this instruction the jury might be warranted in concluding that Reynolds was not guilty of contributory negligence if they conclude from the evidence that he was not negligent in being where he was in the sense that he was sitting on the seat of the wagon, although they might further believe from the evidence that he had not exercised due care in failing to influence or direct where the wagon was at and before the time of the accident. The language of the instruction warrants no such fine distinction, in our opinion, nor do we believe any jury could so understand it. We would repeat a comment of our Supreme Court on a similar criticism in Funk v. Babbitt, 156 Ill. 463, as quoted previously by this court in Dale v. Chicago Junction Ry. Co., 174 Ill. App. 495, to the effect that, "the test is not what the ingenuity of counsel can at leisure work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors, understand the instructions."

As to the contention that the language in this instruction assumes that Reynolds may have permitted himself to be surrounded by the conditions and circumstances existing at and before the moment of the accident and yet be considered as having exercised due care, we have recently had occasion to hold to the contrary in considering an instruction contain-

ing similar language in Whelan v. Chicago Railways Co., No. 23792 in this court,- opinion filed October 16, 1918.

Defendant also complains of the giving of instruction 5 which was as follows:

> "The court instructs you that the law did not necessarily require William Reynolds, the deceased, to exercise extra ordinary care or the highest degree of care at and before the time of the accident in question, the law only required that he should use ordinary care, and ordinary care is such care as a person of ordinary prudence acting prudently would use under the same or like circumstances and conditions."

In our opinion, the giving of this instruction was not error. The phrase "at and before the time of the accident in question," is clearly to be taken in connection with the latter part of the instruction as well as the former and is sufficiently broad as to time nor can it be said that it assumes that an ordinarily prudent man would have permitted himself to be surrounded by the conditions and circumstances which Reynolds is alleged to have permitted himself to be surrounded by at and before the happening of the accident. Much that we have said in connection with our consideration of instruction 11, also applies as to instruction 5.

Complaint is also made of instruction 9, which told the jury that in determining what the facts were and on which side the preponderance lay, they might take into consideration, among other things, "the relation or connection, if any, between the witness and the parties." This was not error, especially in view of instruction 18 in which the court told the jury they were not to disregard the testimony of an unimpeached witness simply because he was or is an employee of

the defendant but that it was their duty to receive and weigh the testimony of such a witness the same as they would that of any other witness and determine the credibility of such a witness by the same tests by which they determined the credibility of the other witnesses.

Our attention has been called to no case holding such an instruction as that involved here, to be erroneous and we know of none. The instructions involved in the cases cited by defendant were materially different from instruction 9 in the case at bar. An instruction similar to instruction 9, has been expressly approved by our Supreme Court. Deering v. Barzals, 227 Ill. 71.

Defendant also complains of instruction 8 which was as follows:

> "The court instructs you that under the law it was the duty of the motorman in charge of defendant's eastbound car as he approached the alley in question, to exercise reasonable care and caution in the management, operation and control of his car."

It is contended that the purpose of giving this instruction was to emphasize the circumstance of approaching the alley and that in doing so, the instruction is rendered objectionable on the ground that it singles out a particular fact and gives it undue prominence. We believe this point is untenable. Furthermore defendant is not in a position to urge the point for in instruction 29, given at its request, the court told the jury that if they believed from the evidence that "as the car approached the place of the accident it was being operated with ordinary care, * * * then your verdict should be forethe defendant."

[illegible]

[illegible]

[illegible]

The last instruction complained of is instruction 3, reading as follows:

> "The court instructs the jury that if, in the trial of the case, or in the argument, counsel for either party has made any statement or statements in reference to the facts in this case, not based upon the evidence, the jury should wholly disregard such statement or statements."

Defendant itself, procured the giving of instruction 14 reading as follows:

> "This case must be decided by the jury on the evidence, under the instructions of the court, and not upon the statements of counsel outside of the evidence, unsupported by the evidence, if any such statements have been made. The evidence and the law alone must govern your verdict."

It is difficult to see any substantial difference between these two instructions. Counsel for defendant says it would be proper to instruct the jury to disregard counsel's statements of what the facts in the case were, if those statements were not based upon the evidence but that it is error to tell the jury they should not consider any statement "<u>in reference to</u>" the facts in the case, if that statement is not based on the evidence. But defendant's own instruction is not confined to the question of "counsel's statements of what the facts in the case were" but refers to "the statements of counsel outside of the evidence, unsupported by the evidence." It is urged that the instruction complained of was directed against legitimate argument made to the jury by counsel for the defendant in two instances based upon alleged facts which, although not in evidence, were matters of common knowledge such as the jury had a right to take into consideration, and on which the court so ruled. But the difficulty with defendant's point as to this instruction is, that instruction 14 given at its request had

the same application to the argument of counsel referred to, as did plaintiff's instruction 3, of which this complaint is made. It may be said that the two instructions are to be distinguished in that instruction 14 is confined to statements of fact, while instruction 3 includes argument about the facts. Assuming this to be true, we believe defendant is not in a position to complain of the giving of instruction 3 for the only detriment which defendant claims to have suffered as the result of the giving of this instruction was in prejudicing certain argument made by defendant's counsel to the jury as to two matters which in both instances was not merely argument about facts but involved statements of fact admittedly outside the record but held, as defendant contended, to be proper as being matters of fact within the common knowledge of men. The matters referred to were within the purview of defendant's instruction 14, as well as plaintiff's instruction 3.

As to all the instructions complained of, we repeat that the alleged errors are sufficiently disposed of, by reason of the fact that as finally given they were all without objection on the part of counsel for defendant. Beyond that however, we believe the giving of them was not error, for the reasons we have given.

Defendant urges the further point that counsel for the plaintiff in his closing argument to the jury, was guilty of conduct which should be held sufficient ground for a reversal of this judgment. We have examined the argument complained of, with care. Objection was not interposed at the trial to portions now urged as ground for reversing the judgment. We are clearly of the opinion that such portions as were objected to on the trial had no prejudicial effect on defendant's case.

Some of the argument objected to was legitimate, such as that referring to the fact that a witness for defendant at a former trial had not been produced upon this trial. Although the defendant had formally rested its case at the close of the court session on Monday afternoon after stating that a witness subpoenaed for the previous Friday had been expected to be present but had not appeared, his absence on Tuesday morning was a legitimate subject of comment as the court had intimated that he would be heard if produced in time, by remarking on Monday afternoon before defendant closed its evidence, "if he comes in when I can, I will hear him." When, however, the argument referred to was objected to, and each counsel had stated his understanding of the situation, and the trial judge said that he had not intended to keep the trial "open this morning because I thought we had taken time enough," and sustained the objection, counsel for plaintiff said "Very well, your Honor," and proceeded with his argument, making no further reference to the absent witness. It was not improper for plaintiff's counsel to refer in his argument to the fact that although the evidence showed the car was well filled, there was but one passenger produced at the trial as a witness. In view of the fact that the former testimony of the absent witness above referred to had not been written up, there should have been no argument to the effect that plaintiff's counsel offered to have that testimony read to the jury but it cannot be said that such remarks as were made on this subject, in the hearing of the jury had any prejudicial effect whatever.

Finally defendant contends that the judgment appealed from cannot stand because both the defendant and Reynolds employer are shown by the evidence to have been engaged in a

character of occupation in which the law declares that, unless expressly negatived, it will be presumed that election has been made to be bound by the terms of the Workmen's Compensation Act, and that inasmuch as the declaration filed by plaintiff did not negative this presumption, there necessarily could be no common law liability on the part of the defendant for the injuries complained of. This question is not preserved for our consideration on this record. The declaration filed, alleged liability on the part of the defendant on the so-called common law theory. Defendant pleaded the general issue. It chose to defend the case on the theory that it was not guilty of the negligence alleged against it. If it was operating under the Workmen's Compensation Act, it could have so shown under its plea of the general issue. Having chosen to defend the case on the other theory, introduced evidence argued the case and submitted instructions on their contention of non-liability under the common law, and the issues on that theory having been decided adversely to it, defendant cannot, on appeal, urge the other theory which it chose not to present to the trial court. Zukas v. Appelton Mfg. Co., 200 Ill. App. 403; 279 Ill. 171; Morris v. Taylor Coal Co., 206 Ill. App. 100, 103; Wolff v. Foote Bros. Gear & Machine Co., 207 Ill. App. 311. Defendant contends that its motion for a directed verdict is sufficient to save this question for review. We hold it is not sufficient, where the record shows that all the evidence before the court was upon the common law issues formed by the pleadings as we have already described them, and fails to show that the question involving the Workmen's Compensation Act was either involved in the evidence or urged in support of the

motion. It is a familiar rule that the controversy between the parties is to be determined in this court on the theory which they adopted and proceeded upon in the trial court. I.C. R. R. Co. v. Heisner, 192 Ill. 571; City of Mattoon v. Hayes, 218 Ill. 594; Davis v. Illinois Collieries Co., 232 Ill. 284, 291; Jones v. Knights of Honor 236 Ill. 113; Millers' Nat. Ins. Co. v. Jackson County Milling Co., 60 Ill. App. 224, 231; C.C.C. & St. L. Ry. Co. v. Stephens, 74 Ill. App. 586, 594; Lenser v. Fidler, 158 Ill. App. 94.

For the reasons stated the judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE TAYLOR DISSENTING.

319 - 24246

MAX LOUIS, a minor, by Simon Louis, his next friend,

Appellant,

vs.

CHICAGO RAILWAYS COMPANY,

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 639

MR. JUSTICE THOMSON delivered the opinion of the court.

In this action the plaintiff sought to recover damages, from the defendant, alleged to have been the result of injuries received by him in being struck by one of its cars. The jury found the issues for the defendant and the court entered judgment accordingly, from which the plaintiff has appealed.

In urging that the judgment be reversed the plaintiff contends that the verdict is against the manifest weight of the evidence and also that the trial court erred in giving certain instructions.

As to the first point the record discloses two entirely different sets of facts, one given by the witnesses for the plaintiff and the other by witnesses for the defendant.

The accident happened on West Twelfth street near Albany avenue in the City of Chicago. The car in question was a westbound car, and the time of the accident was about ten o'clock at night. The plaintiff was apparently about

12 or 13 years of age. The witnesses for the plaintiff stated that the accident occurred on the westbound track, some 10 or 12 feet west of the west cross walk of Albany avenue, while the plaintiff was walking across Twelfth street from the north to the south. His sister and two other children, all about his age, testifies that they had just made some purchases in a bakery shop on the north side of Twelfth street, three or four doors west of Albany avenue and that after leaving the bakery shop they walked east on the north side of Twelfth street until they had nearly reached Albany avenue, when they started to cross over to the south side of Twelfth street, the plaintiff being in the lead, his sister following a few steps behind, and the two other children a few steps behind her. They stated that they were not running but walking, and that the night was wet and somewhat misty and they did not hear or see any car approaching or know that one was near until it struck the plaintiff and knocked him down. The testimony of these three companions of the plaintiff, (the plaintiff himself, did not testify) was corroborated by that of three other witnesses who were on the sidewalk, two, on the north side and one on the south side of Twelfth street, to the effect that the plaintiff was struck while he was walking in a southerly direction across Twelfth street, and these witnesses corroborated the plaintiff's companions in other respects as did also two other witnesses for the plaintiff, who were riding on the front platform of the westbound car, which struck the plaintiff. These latter witnesses did not testify as to the direction in which the plaintiff was going at the time

he was struck;- they both testified that they did not see the boy before the car hit him. From the description of these two witnesses as to their positions on the front platform, it is apparent that neither of them were where they could see a boy crossing the track, within 8 or 10 feet of the car.

The chief occurrence witnesses testifying for the defendant were five in number, three of whom were passengers riding on the front platform of the street car, in positions which enabled them to have a view of the space immediately in front of the car; and two police officers who were standing in front of a moving picture theatre located on the south side of Twelfth street not far from the middle of the block between Albany avenue and the north and south street immediately west of Albany avenue. These witnesses, together with others testifying for the defendant, all said that the car was moving at a moderate rate of speed, about 10 or 12 miles per hour and that the motorman made a quick stop, the car moving a distance estimated at from 10 to 20 feet after striking the boy. The three platform witnesses referred to, said that the boy ran into the path of the car when the car was about 6 or 10 feet away from him, and that he was running across Twelfth street from the south to the north. One of these witnesses mentions an eastbound car and says that when the westbound car was about one-third of a block from Albany avenue, the boy ran out on to the westbound track, from behind the eastbound car. The two police officers testified that while they were standing in front of the moving picture theatre referred to, they noticed a boy, (the plaintiff) also standing there looking at some of the pictures displayed by the theatre, and as they were

standing there on the sidewalk the boy ran across the street to the north, passing behind an eastbound car and running on to the westbound track, in the path of the westbound car; and one of the officers testified, "I hollered at the boy when I saw the car was going so close to him. He was four or five feet in front of the westbound car when he went in front of it * * * The boy was probably 8 or 10 feet west of me when he started across the street." All of these witnesses testified that the boy was alone. As soon as the car came to a stop the officers went into the street, passing around the east end of the car and apparently along the north side of Twelfth street to the front end of the car, where they removed the boy from the fender beneath the car, where they found him lying. He was lying on the fender to the north of the center of the car and his head was to the north and his feet were to the south. The testimony is to the effect, that at the time the motorman threw off his current and put on his air brakes he jammed down the emergency fender, which was the one on which the boy was lying. At the time of the accident the conductor testified he was on the rear platform and did not see what occurred. The motorman could not be found at the time of the trial.

From our examination of the testimony in this case, it is our opinion, not only that it is not against the manifest weight of the evidence, as the plaintiff contends, but that it is such as would have necessitated setting aside a verdict for the plaintiff had such a verdict been returned by the jury. Although the facts are not in all respects similar to those involved here, much that we said in deciding the case of Warren v. Chicago City Railways Co., 210 Ill.

App. 114, is equally applicable here, in the case at bar.

On the question of instructions, it is contended that the trial court erred in giving the three instructions numbered 26, 27 and 32, in each of which the court referred to the question of the contributory negligence of the plaintiff as a failure to exercise ordinary care for his own safety, which caused or proximately contributed to the accident in question. It is urged that the giving of these instructions was error in that they did not limit the degree of care required of the plaintiff to such as might reasonably be expected of a child of his age, intelligence, capacity and experience, under the circumstances shown by the evidence. The plaintiff is not in a position to complain of the instructions referred to, for the plaintiff submitted an instruction to the same effect, so far as this element is concerned, as the ones he now complains of; which instruction was given by the court. Meinturff v. Insurance Company of North America, 248 Ill. 92; B. & O. S.W. Ry. Co. v. Then, 159 Ill. 533, 538; Brennan v. Carterville Coal Co., 241 Ill. 610; West Chicago Street R. R. Co. v. Buckley, 200 Ill. 260 But even if the plaintiff was in a position to complain of the alleged error in question, it could not bring about a reversal of the judgment in this case, by reason of the fact that it is so clearly apparent, from the reading of the testimony, that the merits of the case are in accord with the verdict which the jury returned, and that, under the evidence, no other verdict could be sustained. Fistel v. Chicago City Ry. Co., 113 Ill. App. 331; Stewart v. Clark, 194 Ill. App. 2; Heller v. Chicago City Railway Co., 209 Ill. App.

146.

For the reasons stated, the judgment of the Circuit Court is affirmed.

AFFIRMED.

331 - 24253

JULIUS HECHT,

Appellant,

vs.

LEOPOLD OESTERREICHER,
et al,

Appellees.

APPEAL FROM
SUPREME COURT,
COOK COUNTY.

214 I.A. 639[3]

MR. JUSTICE THEIS delivered the opinion of the court.

This is an appeal by the complainant from a decree dismissing his bill for want of equity, which action was taken by the trial court at the close of the complainant's case.

In support of the allegations contained in the amended and supplemental bill, as amended, the complainant's evidence tended to show the following facts.

(We shall refer to Julius Hecht as the complainant and Leopold Oesterreicher as the defendant.)

The complainant was in the bunch kindle wood business on Jones street in the City of Chicago; his property consisting of a piece of real estate with improvements and, certain personalty. He had conducted this business for many years.

Some years after the complainant had established his business, the defendant became a competitor of his and at the time the bill was filed was engaged in the same line

of business on Altgeld street, in the City of Chicago and at several other locations. The defendant was engaged, with others, in conducting a porporation called the Chicago Wood & Coal Co., but it is not clear from the record whether the Altgeld Street business was or was not included in that corporation.

The defendant suggested to the complainant that they unite their interests in a new corporation to be known as the United States Wood & Coke Company each bringing into the new corporation their respective assets and receiving therefor a half interest in it.

The complainant testified that his business was appraised at $6,000 and the defendant's Altgeld street business, which was to come into the new company, at $12,000. There is no explanation of why, notwithstanding that fact, they agreed to bring these assets into the new company on an equal basis.

The new corporation was organized, the defendant becoming the president and the complainant, the secretary and treasurer; and the complainant testified that a certificate of stock for 59 shares was issued to him and another for one share to his wife, and that there were two other certificates for the same amount of stock issued in blank and the balance of the stock was issued to the defendant and his wife.

The complainant says that thedefendant told him that one Keller was interested with him in the Chicago Wood & Coal Co. and that it would be necessary for him to pay Keller $10,000 for his interest in order to enable

him to bring his part of the assets into the new company, free of incumbrance, and he suggested that when that had been done, he, the defendant, should receive the notes of the new company in the sum of $10,000 and that to secure these notes the complainant deposited with him half of his stock. On the representation of the defendant that he had paid the $10,000 the notes of the new corporation were executed and signed by defendant, as president, and complainant as secretary and treasurer, and the complainant says the 60 shares of stock issued in blank were deposited with the defendant to secure his notes.

These two parties entered into a contract, which referred to this $10,000 as an indebtedness of the corporation to the defendant and the giving of a series of notes to the defendant by reason of the indebtedness, and authorized the sale of the stock held as security in case any one of the notes was not paid at maturity.

The complainant executed a deed of his Jones street property to the new corporation and a bill of sale of his personalty for a recited consideration of $6,000 in payment of which complainant therein agreed to accept 60 shares of stock, this meeting in full the subscriptions of himself and wife for that amount of said stock. The defendant executed a bill of sale of his business and the assets connected with it and this recited a consideration of $28,000 and therein the defendant agrees to accept the purchase price in the shape of the capital stock of the new corporation to the extent of $18,000 thereby paying in full the subscription of himself and wife for 180 shares of the new stock and the balance of the amount in the

new company's notes, aggregating the sum of $10,000.

At the time the parties entered into this arrangement, which was about the middle of July, 1912, they executed agreements whereby complainant was employed as the general manager of the new company for a period of three years; he to give his entire time to the business and receive a salary of $30 per week; and the defendant was employed as assistant general manager for a period of three years; he to give only part of his time to the business at the salary of $15 per week. On the same date the parties entered into another contract, reciting the execution of 7 notes aggregating the sum of $10,000, evidencing the corporation's indebtedness to the defendant and recited also the deposit of 60 shares of stock in the new company with the defendant, by the complainant as collateral security, which stock the defendant agreed to return to the complainant after the last of the notes was paid. This contract provided for the sale of the collateral if any one of the notes was not paid at maturity.

Complainant testified that during the first year the new company made $2,500; but there is no evidence as to whether any profit was made after that.

Under date of July 2, 1913, these two parties executed another contract in which the complainant agreed to work for the company from the date of the contract up to the time that all the indebtedness due from the company to the defendant was fully paid, giving all his time to the business, at the salary of $30 per week, acting as General Manager of the company, "and shall manage the same, subject to the approval and direction of the Board of Directors of said corporation." In this contract the defendant agreed

that when all the indebtedness due him had been paid out of the proceeds of the business, he would cause the company to convey back to the complainant the Jones street property and all the personalty that he had brought into the new corporation, paying at an appraised value, for any of the original articles that might be found to have been damaged or destroyed. In other words the defendant agreed to turn the Jones street business back to the complainant as soon as the proceeds of the new company had been sufficient to take up all the notes. The list of things to be turned back to the complainant is not contained in the contract, but the contract refers to an itemized inventory and list of the property as being attached and marked Exhibit "A". When the contract was offered in evidence Exhibit "A" was not attached and the defendant claimed that the complainant was to have furnished it but that he had never done so. This contract further provided that when the complainant received back his property he was to surrender the 59 shares of stock he held in the new company to the defendant. The complainant's son Max had been employed by the new company and he was a party to this last contract and by the contract both he and the complainant agreed that they would directly or indirectly engage in the bunch kindling wood business for the period covered by the contract, and to exceed two years from its date.

Although the complainant was the secretary and treasurer of the United States Wood & Coke Company he never had any of its books or papers in his possession, the defendant keeping everything of this nature belonging to the company,

[illegible]

[illegible]

[illegible]

locked up in a safe. Along in February 1914, there was a special meeting of the stockholders of the United States Wood & Coke Company. It is not clear from the record whether the complainant received a notice of that meeting. At one place in his testimony the complainant says he did receive such a notice, but at another place it would seem as though he might be referring to a notice he received after the meeting, advising him what had taken place there. This last notice is in writing and in it the complainant is advised that at this special meeting a new board of directors was elected consisting of the defendant, his wife, his son Morris, and a nephew David Simon; and that at a special meeting of the directors these persons were elected as the officers of the company; the defendant as president, his wife as vice-president, his son as treasurer and his nephew as secretary.

Under date of March 31, 1914, the complainant received a long written notice informing him that he had not complied with his agreement to procure certain releases on his Jones street property and deliver them to the United States Wood & Coke Company and that he had failed to deliver some of the articles covered by his bill of sale, and he was notified to comply with his alleged agreements in both respects; and by another paragraph he was further notified, "that the undersigned, as president of the United States Wood & Coke Company and in accordance with the wishes of the directors of said corporation, does hereby, notify and request you, from and after April 1, A. D. 1914, to devote all your time, in accordance with the contract of employment with said corporation, to attending to the business of said corporation upon the premises and in the yard and office of

said corporation, * * * and no other place * * * and your failure to do so will be taken by said corporation to be a breach of your contract of employment." This was signed by the defendant.

The complainant testified that he worked for the company every day but that following the receipt of this notice he did not continue working for the company but that he went to the office several times after April first, demanding an accounting. He testified that following the receipt of the notice of March 31, he did not go to the office the next Monday morning, "as he did not feel good, and meanwhile he got that letter in question." From the record, the witness would seem to be referring to complainant's Exhibit 1. There is nothing in the record so marked, but there is a letter from the defendant to the complainant dated April 6, 1914, reciting that in view of the fact that he had advised the company's representative that he would not continue to work for them any longer, "and as you have not appeared for work today and in view of the further fact that you have not carried out the directions heretofore given you, we beg to notify you that we have found it necessary to fill your place." About this time or shortly thereafter, the services of the complainant's son Max were dispensed with by the company.

And complainant testified that he had never received back any of the property he had originally put into the company; that he had tried to secure an accounting, believing that the company had made enough money to take up all the notes held by the defendant, in which case, under their

contract, the defendant would be obliged to turn the complainant's property back to him, but that he had never secured an accounting. He testified further that the defendant had drawn money out of the company beyond the amounts he was to receive as salary under the contract, and further that the defendant had never advanced the $10,000 at the time they formed the new company as he represented he had. When he was testifying on the latter point he was asked as to when he had learned of the fact that the defendant had not put up the $10,000 as he had stated, and the court seems to have sustained an objection to that question, apparently on the ground that the complainant was not seeking the cancellation of the contracts on the ground of fraud, but was merely asking substantially that the agreements of the parties be carried out and that an accounting be had for the purpose of discovering whether, as a matter of fact, the company had made sufficient to take up the notes held by the defendant and if that proved to be the case the defendant be required to convey the Jones street business back to the complainant.

In addition to Leopold Oesterreicher, his wife, the Chicago Wood & Coal Company, and the United States Wood & Coke Co., were made parties defendant and as heretofore stated the chancellor dismissed the bill for want of equity, when the complainant rested his case.

In our opinion the complainant made out a case which entitled him to relief, if not under his prayer for an accounting, under the general prayer for relief which his bill contained. It is apparent that the whole course

of the defendant, had for its purpose the elimination of the Hechts as competitors in this line of business. If the complainant was as lacking in business acumen as we think he must have been from the evidence, he should not be held to occupy the same position in a court of equity as he might be held to, if the contrary were true. If the defendant never made the expenditure of the $10,000 which was the basis of the notes involved, which was the heart of the whole business, it would seem that the complainant would be entitled to a return of all the property he put into the new company. The only evidence in the record on this alleged expenditure of $10,000 on the part of the defendant, is the testimony of the complainant to the effect that it was never made. The only evidence in the record on the question of the withdrawal of funds from the company by the defendant in addition to the salary he was entitled to under the contracts, is the testimony of the complainant to the effect that such withdrawals were made. True, this is not the best evidence of that matter but the introduction of this evidence was not objected to on that ground. While the bill might have contained more accurate allegations, it does substantially charge the defendants with conspiring to get the complainant's property and then eliminate him, and this seems to be borne out by such evidence as there is in the record. From the showing that was made we are of the opinion that the case should have been referred to a Master for a full hearing as to the receipts and expenditures of the United States Wood & Coke Company and an accounting by the defendant as to all withdrawals from the company, and also the taking of such proof as might be submitted on the

question of the payment of the $10,000 by the defendant to Holler. If the proceedings in connection with the special stockholders meeting of February 1914, were regular, they cannot be objected to, because of the bare fact that the new directors were all members of the defendant's family. The stockholders holding or controlling the majority of the stock of course have a right to elect the directors at any regular meeting, or special meeting properly held, and to control the company, but here they seem to have been the whole company, so far eliminating the minority, for all practical purposes, as to eliminate it entirely and according to the testimony, even while the complainant was a director and officer of the company, he was kept in complete ignorance of all its affairs, never even being permitted to have its books in his possession although he was the company's secretary.

Although neither the bill nor the evidence is as clear and explicit as it ought to be, we are of the opinion that the complainant's case as it stands in the record, with all inferences which we can properly draw from the testimony as given, is such that the trial court should have called upon the defendants to submit such defense as they cared to make; and therefore the decree of the Superior Court is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

349 - 24276

WILLIAM J. ARMSTRONG,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
et al,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 639[4]

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Armstrong, brought this action against the defendant to recover damages alleged to have resulted from injuries received when one of the defendants' cars ran into an electric delivery truck which the plaintiff was driving. The jury found the issues for the plaintiff and assessed his damages at the sum of $6,800, and judgment was entered for that amount.

The defendant contends that the damages awarded were excessive, that counsel for plaintiff indulged in erroneous and prejudicial argument and that the trial court erred in the giving of certain instructions to the jury. There was a sharp conflict in the evidence. The plaintiff testified that he was driving his machine in the car tracks of the defendant and came to a stop in the tracks 8 or 10 feet behind a car which had come to a standstill, by reason of cross-traffic at the street intersection and that while he was in that position another car came up from behind and ran into the rear of his machine, striking it twice

and knocking it up against the car in front. He says he was knocked unconscious in the collision and that after he had regained consciousness and the car in front had proceeded on its way, he drove his machine over to the curb, and after some minutes drove it back to his employers, Carson, Pirie, Scott & Company, and that at no time did he get out of his machine. There were two occurrence witnesses for the plaintiff, who corroborated him in some respects. One stated that when he first saw the plaintiff's machine it was in the street car track, but that he couldn't tell whether it was "tracking" or whether it was partly out and partly in the tracks. It would appear from the testimony of this witness that he had not noticed the machine until "shortly before the impact happened." The other witness referred to said that he did not see "at what point this man (the plaintiff) came in on the track". For the defendant, the motorman testified that the plaintiff had been driving his machine in the roadway between the tracks and the curb, and that as he was driving his car up to the point where the car ahead was stopped, the plaintiff tried to cut in between the two cars and he was unable to avoid hitting the machine a glancing blow on the side, back of the front wheel, pushing it into the car ahead. He stated that he did not see the plaintiff before the latter drove in ahead of him. He was corroborated by the conductor and also by the motorman of another car that was closely following the car that ran into the plaintiff's machine. The accident happened a little before five o'clock in the afternoon, on Wabash avenue just south of Adams street, in the City of Chicago.

The traffic at this time of the day is heavy. These three witnesses all testified that the plaintiff jumped out of his machine, after the accident, and proceeded to get the names of witnesses, and pulled off the motorman's cap, for the purpose of ascertaining his number. The theory of the defendants was further borne out by the conductor and the motorman of the car ahead into which the plaintiff's car was pushed. The latter witness states that after he had left the front platform of his car, after the accident, and walked back to the rear end of the car, he did not see any one in the automobile at all.

After the plaintiff had returned to his place of employment, he was examined by the house physician for Carson, Pirie, Scott & Company, who told him he would be "off a while". The plaintiff then went home on a street car unaccompanied. The following morning his back was very sore and stiff and there was some swelling. He got up, at about ten o'clock in the morning and was about the house during the day but did not go out. He was confined to his house for five or six weeks; his physician seeing him once or twice a week, prescribing the use of a liniment on his back and limbs. The accident happened on May 12 and he returned to his work September 7, doing light work, delivering small packages, up to the middle of December when he began driving a machine again, and about the first of the year he went back to his regular work, and continued in that capacity up to the time of the trial. At the time of his injury his wages amounted to $16 a week. At the time of the trial he was earning $19 a week. The only injury he seems to have sustained was a partial displacement of one

of his ribs on the left side. This occasioned some stiffness or rigidity about the small of the back. The doctor, who attended him from the middle of June until early in August, stated that at first he "saw that the spine in the lower thoracic region was stiffened, found the muscles very rigid, sore, stiff and more or less fixation of the spine about the last two dorsal and the first lumbar vertebrae." This doctor stated that in August his condition was improving. He further stated that there was a great deal of difference in his condition at the time of the trial and his condition in August after he was injured. The doctor's testimony was "He is much improved, the rigidity to the spine has greatly disappeared. There is not so much apparent pain on motion as there was at that time; there is not so much rigidity of the spine. The rib remains the same, still displaced. That displacement of the rib is necessarily a painful condition."

It would seem from this evidence, that the damages awarded by the jury are out of all proportion to the injuries the plaintiff received.

In the course of his argument, counsel for the plaintiff said "In regard to the instructions of the court; the court will instruct you,- these instructions are prepared by counsel for either side ." Counsel for the defendants interposed an objection to this statement, which the court overruled and thereupon counsel for the plaintiff proceeded as follows:

"The instructions are prepared by counsel for either side and they must state the law correctly, but there are such instructions that read in this way, if you find so and so and so, then you will find for the plaintiff, and if you find so and so and so, then you shall find for the defendant. In other words, counsel on one side always gives instructions that emanate from his point of view in the case, and the counsel on the other side have the same right to give their point of view, and then the court looks over these instructions and refuses such instructions as he thinks are erroneous and gives those that he thinks state the correct view of the law on the subject. Now, instructions are very insidious things. You can give instructions and leave out one or two words and for that reason the case will be reversed in the higher court. After you have won your case it is very easy to give instructions and leave out a word or two of it, and then lose your whole case in a higher court, by just that instruction. So for that reason I have given in this case very few instructions."

Counsel for defendants objected to this statement and the objection was again overruled. This argument was clearly improper and the objection to it should have been sustained, but the prejudicial effect of the argument could hardly have been eliminated even though the objection had been sustained. Instructions are not to be taken by a jury as given by counsel for the litigants involved, but by the court. Anything said in argument in any way to the contrary is improper, and an argument advising the jury that the instructions which they are later to receive from the court are "very insidious things" or something in the nature of traps by reason of which a case may be won or lost, due to the improper use or omission of a word or a phrase, is highly prejudicial. Instructions given the jury by the court should make up an accurate and a fair and impartial statement of the rules of law which they are to follow as a guide in deciding the issues of fact presented to them, and no statement should be made to the jury by counsel voicing any view that he may entertain to the contrary.

In his argument, counsel for the plaintiff further said:

> "All of the doctors have testified this condition is permanent. A man with a back in that condition is not, in my opinion, going to last a very long time at active work. He is doing now, he has done and probably will do, as long as he can, very light work. But after a few years he will simply play out and go down with a crash."

Objection to this argument was not ruled upon by the trial court. We have been unable to find any testimony in the record which would warrant such an argument, and none has been called to our attention. There is some testimony to the effect that the plaintiff has received such an injury as will be permanent, but, in our opinion, there is no testimony from which it can even be inferred that as a result of the injury the plaintiff, after a few years would, or even might, "simply play out and go down with a crash." The evidence would seem to indicate the contrary; for his own physician testifies that at the time of the trial, which was November 1917, his condition was much improved and that the rigidity of the spine had greatly disappeared. From this it would seem that the [illegible] as to his physical condition, was decidedly up rather than down.

Continuing after the argument last above referred to, counsel said to the jury:

> "I state, gentlemen, that is my opinion upon the subject. You can take it for what it is worth. It is not evidence in the case, you can believe it or not, as you like. Now, suppose this man after five years is unable to work any longer. We will assume he receives a verdict of ten thousand dollars, suppose he invests it. Well, we will take, how much he will get out of it. Say he will have handed to him after this case is tried seven thousand dollars."

At this point another objection was interposed by counsel for the defendant, and again the trial court did not rule but said, "Let the jury decide." Plaintiff's counsel continued:

> "I assume he will get seven thousand dollars. Seven thousand dollars and a mortgage, say, six per cent, would be four hundred and twenty dollars a year, would be the income that he would get out of that much money. Well, I assume then that the firm he has worked for, if he has retired, I don't know whether that is true or not -- assume they will pay him as much as that themselves, assume he gets eight hundred and forty dollars a year. That is not a magnificient sum for a man to live upon. He can take his money if he is incapacitated for work and go out and spend it from year to year and live very long. But he necessarily will have to invest that money in some kind of security to live on, and I submit that that is not an exorbitant sum at this time. I will call your attention to the fact too that what may have been a large verdict a few years ago, is not such a large verdict now. Money is a relative thing, and changes. What was ten thousand three years ago is not ten thousand at the present time. Articles have all gone up, everything has gone up, money is worth about two-thirds of what it was three years ago, as you well know."

Much of this argument was improper; it contained an intimation, which the average jury would hardly fail to get, to the effect that they were being urged to be sure and make their verdict ample enough to enable the plaintiff to meet his lawyer's fees and other expenses of the litigation and have enough remaining to net him a reasonable annuity; and the argument included assumptions as to which there was no evidence, and which could not properly be inferred from the testimony, and as to which, no testimony would have been admissible. In case one is injured through the negligence of another, the damages which he may recover under the law, are to be measured by a reasonable compensation for the injuries, including certain elements which are well defined, and are not to be measured by a sum which, when

[illegible]

[illegible]

[illegible]

invested, will afford him any given annuity.

We are of the opinion that the parts of the argument we have referred to had considerable to do with the size of the verdict returned, and did not leave the jury free to weigh the evidence impartially and return a verdict, both as to liability and damages, if any, with prejudice.

By instruction 3, the court told the jury that they had the right to discard the entire testimony of any witness, if they believed from the evidence, he had willfully and knowingly sworn falsely to any material fact in the case, except as to those matters where "his testimony is corroborated by other evidence which you believe from the evidence to be credible or by facts and circumstances appearing from the evidence." The language of this instruction is somewhat different from those which are held to be erroneous in C. & A. R. R. Co., v. Kelly, 210 Ill. 449 and Steiner v. Higgins, 210 Ill. App. 119, but in our opinion it is quite as inaccurate as are the instructions involved in those cases. The instruction is wrong in limiting the jury, in passing upon the credibility of the witnesses, to the evidence; whereas there are many things which the jury not only may, but should take into consideration, in passing upon the credibility of a witness, which cannot properly be said to be included in the evidence in the case; such as his appearance on the stand, his apparent candor, bias, or the lack of these things, and the other familiar tests of credibility.

Defendant also complains of instruction 6, which was as follows:

"The plaintiff had a perfect right, while in the exercise of ordinary care for his own safety, to use and travel upon the street where the accident happened, including that portion where the car tracks are laid, being obliged only to get off the tracks and allow cars to pass when they approached for that purpose, and for such use of the street car tracks by the plaintiff he is in no sense a trespasser upon thetracks of the defendant."

There might be cases in which this instruction would be proper. Chicago City Ry. Co. v. Rohe, 118 Ill. App. 322. In view of the issues of fact presented to the jury in the case at bar, we believe this instruction should not have been given, as it might tend to mislead the jury.

In instruction 7, the jury were told that in estimating the amount of the damages, they had a right to take into consideration "all of the facts and circumstances you believe are proven by the evidence before you." This instruction should have limited the jury in estimating the amount of damages they were to assess, if any, to a consideration of such evidence as was before them bearing upon the question of damages. I. C. R. R. Co. v. Johnson, 221 Ill. 42; Levitan v. C. C. R. Co., 203 Ill. App. 441; Pate v. Gus Blair B. M. Coal Co., 158 Ill. App. 578. Counsel for the plaintiff have called our attention to Donk Bros. Coal Co. v. Thil, 228 Ill. 233, where the court upheld an instruction which directed the jury in estimating the damages, "to take into consideration all the facts and circumstances asproven by the evidence before them." The objection made here does not seem to have been made against the instruction in the case cited. Our attention has also been called to the case of Malley v. City of Chicago, 169 Ill. App. 593 and Chicago City Ry. Co. v. Gemmill, 209 Ill. 638. In these cases instructions similar to the one involved

in the case at bar, were criticised but they were held not to be reversible error, as it did not appear that the jury had been misled by them. In our opinion the instruction involved here did mislead the jury. As stated above, the evidence in the record which might properly be considered in estimating the amount of the plaintiff's damages, could not be reasonably considered as warranting the verdict which the jury returned. In fixing the amount of the damages as they did, the jury probably considered other evidence not bearing on the question of damages and which this instruction told them they might take into consideration in fixing the damages.

For the reasons stated, the judgment of the Circuit Court is reversed and the case is remanded to that court for a new trial.

REVERSED AND REMANDED.

362 - 24289

MAX ITSCOVICH,

Appellee,

vs.

CONSOLIDATED CLOAK AND SUIT COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 639 5

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an appeal from a judgment of the Municipal Court of Chicago, in favor of the plaintiff, for $320.49, for alleged breach of contract of employment. The plaintiff testified that the defendant hired him for a period of six months and that the wages agreed upon were, $25 a week for the first three months and $22 a week for the following three months, which came during the slack period of the year. He further testified that he asked one Alter, a member of the defendant firm, for a contract in writing and that the latter told him to have such a contract prepared and he would execute it; that he did prepare such a written contract and request its execution, but that Alter declined to sign it because it was, "against the principles of the Union;" that Alter told him that their word was as good as any piece of paper, and that the contract would be fulfilled as had been orally agreed upon. The plaintiff was corroborated by several witnesses, one of them stating that he heard the plaintiff and Alter talking about the agreement in regard to the Union, and that the Union officials

would not allow any agreement with any workmen, and that he heard Alter tell the plaintiff that he could take his word for it, that the contract was just as good as if it were written. Defendant's foreman testifying for plaintiff said he heard Alter make the oral contract claimed by the plaintiff and that he also heard him offer to sign it if the plaintiff would have it reduced to writing, and that later on he heard the plaintiff ask Alter to sign it and Alter declined to do so, saying that he was good for it and did not need to sign it. On the other hand, Alter, testifying for the defendant, said that he hired the plaintiff by the week, but did not make any agreement for the period of six months, which is claimed by him. He states further that, after the plaintiff started to work he brought the witness a paper to sign, saying that it was an agreement for a year or six months, but he says he told the plaintiff, "We don't sign any contracts, it is not allowed in our association with the union." While on the witness stand, the witness Alter was asked, "What was the rule in that agreement in regard to the employment of people in his line"? This question was objected to, and the objection sustained; which ruling of the court is assigned as error. In our opinion we cannot say that the ruling was erroneous. In the first place, it is not possible for us to know whether the rule would have tended to prove or disprove any of the issues, for the contents of the rule are not shown in the record, by any offer of testimony in behalf of the defendant. But assuming that the rule was to the effect that the manufacturers, members of the association, would not hire men by the week during the slack season, we are unable to see how such fact would tend

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to prove or disprove the dispute between the parties. If there was a dispute, as to the existence of the rule, or as to whether in their controversy over this contract the rule and its contents was brought up, theevidence might have been competent, but no such issue was involved. It is admitted that the rule was mentioned and that statements of Alter were to the effect that he did not care to sign the written agreement because it was such a contract as their agreement with the union prohibited. The testimony as to these matters on the part of the plaintiff and the defendant being in accord and the issue being whether or not the defendant had, notwithstanding the union agreement, made the alleged oral contract with the plaintiff, evidence as to the rule and the agreement by the union and the Association of Manufacturers as to the employment of men, was immaterial. The thing sought to be proven by the question objected to was practically admitted, the plaintiff himself testifying that the defendant, Alter, refused to sign the written memorandum, giving as his reason the fact that it violated the union agreement.

In urging that the judgment be reversed, the defendant further contends that the plaintiff failed to prove any readiness, ability, or offer to perform the balance of his contract. The evidence showed that the plaintiff worked for the defendant for six weeks, receiving $25 a week. At the end of this time he was called into the defendant's office and handed a check for $25 covering his wages for the current week, which was marked "In full", and he was told that from then on, if he wanted to work on the basis of piece work he could do so but that he could no longer be

paid by the week. Plaintiff not being willing to work on the piece work basis, looked for employment elsewhere. For the balance of the alleged contract period he was able to procure work only part of the time, earning a total of $127.90, which sum has been taken into account in fixing the amount of the judgment.

It was not necessary for the plaintiff to show repeated offers on his part to perform the balance of the contract. Where one of the contracting parties, by his own act, puts it out of the power of the other party to perform his part of the contract, no offer of performance is necessary. Board of Education v. Brown, 29 Ill. App. 572.

If the plaintiff was hired for the definite period of six months at $25 a week and after working for a time under that basis, was told that he would no longer be paid by the week but that the defendant would continue to give him work under the piece system, he was not obliged to continue the employment, but was at liberty to seek employment elsewhere, as he did, and hold the defendant for the difference between his wages for the balance of the period of the contract and what he was able to earn as the result of his bona fide effort during that period, elsewhere. Doherty v. Shipper & Block, 157 Ill. App. 413.

Defendant further contends that there is no evidence of a discharge. We think that the evidence already referred to is sufficient to establish a discharge. We believe from the evidence that the court was warranted in finding that the alleged oral contract was entered into. That being the case, what Alter told the plaintiff upon handing him his weekly check

pain for our sake. Inasmuch as being activity is good in the great main basis, it does not implicitly eliminate. For the balance of the highest mentioned details in the well is one-more work their part of the same, working a fact of fact, which can be been known from serious in finding the manner of the Jesuits.

It was not necessarily for the plurality or view the people affirm in the part of principle the balance of the contract. There exact the mentioning matters, in his own act. Into it and of the power of the other world is pos-from his part of the contrary, or effect of particularly is however. Study of Christian in Africa, pp 112. 1st, 179.

If the plurality was right for the religious people of the random of 1?? a week but other working for a fact-maker that basis, you call that be-will be longer to part of our week but just the determined world maintain or view the world the river system, in the not obliges to continue the religious, but and in finding or each religious phenomena, as be old, and back the difficult for the self-cause because the result for the balance of the people of the religious and what be you take to work as the result of our Jesus Christ either during the part, elements. Darwin in Theism a Study, 1st 112. Apr. 111.

Different Darwin mentioned that fact is in -ideas of a phenomena. He right that the religious already believed be in religions to consider a phenomena. The believe from the opinions that the world was necessary in finding that the religious and immortal was natural case. That being the work, that after into the plurality that consider the all worship the is

for $25and marked "In full", at the end of six weeks time, that he would not be continued on a weekly payment basis but could do piece work if he wished, it amounted to a discharge under that contract and the piece work proposition then made by the defendant amounted to an offer of a new contract which the plaintiff was under no obligation to accept.

The only other point urged by the defendant is to the effect that even if the conduct of the defendant amounted to a discharge of the plaintiff, it was warranted by reason of the fact that there was evidence showing that the plaintiff's work was unsatisfactory. This is disproven by the fact that at the time the defendant terminated his working on the basis of $25 a week, the plaintiff was told that he could continue to do work for the defendant, on the new basis suggested, which seems rather inconsistent with the contention made now, that the plaintiff's work was not satisfactory.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

376 - 24303

JOSEPH ZAVERTNIK,

Appellee,

vs.

MARTIN V. KONDA and
MARY V. KONDA,

Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 640

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action for libel brought by the plaintiff, Zavertnik, against the defendants, resulting in a verdict finding the issues for the plaintiff and assessing his damages at the sum of $200. The defendants have appealed from the judgment for that amount.

The plaintiff is a member of the Slovenian National Benefit Society, having about twelve thousand members located all over the United States. The Society publishes a newspaper in the Slovenian language called the Glasilo and the plaintiff had been elected by the Society as the editor of this newspaper. The defendants were the proprietors of another newspaper, printed in the Slovenian language, which had a wide circulation among Slovenians, including members of the Benefit Society referred to.

The libel complained of was an open letter, by one Faletic, published in the defendants' newspaper. The only part of the alleged libel to which it is necessary to refer is that part of it which stated that the Editor

and Manager of the Glasilo were breaking the rules of the by-laws of the Benefit Society "by accepting in Glasilo advertisements from fraudulent firms by embezzling money for their own benefit for which members of the SNPJ (the Benefit Society) were defrauded." This alleged libel was in the Slovenian language and the translator testifying for the plaintiff gave it as stated above. There were witnesses for the defendants whose testimony was to the effect that there was nothing in the original which could be correctly translated, "embezzlement". They testified that a correct translation of the original words was that the editor and administrator of The Glasilo had disobeyed the by-laws of the Benefit society "because they published in Glasilo advertisements of fraudulent concerns out of greediness for gain for com ission, and members of the SNPJ were defrauded."

The defendants contend that the weight of the evidence was to the effect that the latter was the correct translation and that, as so translated, the language complained of was not libelous per se. The evidence as to the correct translation being in conflict it was for the jury to determine that issue and from our examination of the record we cannot say that their finding was against the manifest weight of the evidence, assuming that they adopted the translation contended for by the plaintiff. The declaration, after charging the publication of the alleged libel, alleges, meaning and intending thereby to insinuate

and charge that the said plaintiff was breaking the rules and working against the interests of said the Slovenic National Benefit Society and using his said position as editor to defraud the members of said society." That such was the effect of the publication, is shown by the fact in evidence, that following it, the plaintiff received several hundred letters from members of the society concerning it. The defendant does not urge this point but rather that under the evidence, the correct meaning of the original words used cannot be taken as testified to by plaintiff's witnesses but must be taken as testified to by defendant's witnesses. We are of the opinion that the verdict of the jury was warranted, even though the translation contended for by the defendant, be taken as the correct one. The plaintiff, elected by the Society to act as the editor of its official paper, was paid a salary for his services but was entitled to no commissions on advertising. To publish a statement, therefore, to the effect that he was violating the by-laws of the Society in publishing advertisements of fraudulent concerns in its official newspaper, out of his greediness for gain for commissions, and thus defrauding members of the Society, was libelous *per se*. *Kenney v. Illinois State Journal Co.*, 64 Ill. App. 39. *White v. Nouquin*, 264 Ill. 83; *Cerveny v. Chicago Daily News*, 139 Ill. 345. Any written words are libelous *per se* which impute to one "fraud or dishonesty or any mean and dishonorable trickery in the conduct of his business, or which in any other manner are prejudicial to him, in the way of his employment or trade." *Willfred Coal Co. v. Sapp*, 193 Ill. App. 400, 409.

There was a plea of justification interposed by the

defendants, but in our opinion it was not proven. There was evidence to the effect that a notice had been published in The Glasilo, warning its readers against certain advertisements which had been appearing in different Slovenian newspapers. We find no evidence, however, to the effect that the advertisements referred to had ever appeared in the Glasilo. There was testimony by one witness to the effect that he had answered an advertisement in the Glasilo and had sent $5.00 to the International Phonograph Company of New York for a phonograph and that he never received the phonograph or obtained the return of his money. That was the only instance of the kind in the evidence. It does not establish that the advertisement referred to was fraudulent, but beyond that there was no evidence that the advertisement was published with the knowledge of the plaintiff, or that he received any commission on this or any other advertisement appearing in the paper.

Over objection of counsel for the defendants, some evidence was introduced concerning a hearing before a convention of the Benefit Society, which seems to have been something in the nature of a trial, for the purpose of determining whether Faletic, who wrote the article, was guilty of making false statements, or whether the officers of the Society had violated its by-laws as alleged. This trial seems to have been occasioned by statements contained in the article in question, which did not involve the plaintiff here, but were rather directed to the officers of the Benefit Society, charging them with misusing the official newspaper of the [illegible] Society by making it an organ of Socialism and the Socialist

party. We are of the opinion that this evidence should not have been admitted, but we do not consider it reversible error. The verdict was fully supported by the evidence, without regard to the testimony just referred to, and in our opinion its admission worked no harm to the defendants.

For the reasons stated, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Mr. Justice Taylor dissents.

392 - 24330

AMBROSE J. KRIER,

Appellee,

vs.

WALTER MEEK and HARRY MEEK, doing business as Meek & Meek,

Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 640

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a judgment for possession, entered in the Municipal Court of Chicago in a suit of forcible entry and detainer in favor of the plaintiff, Krier, and against the defendants Meek and Meek.

Prior to July 1917, the premises in question were in the possession of Gibson's Picture and Gift Shop, a corporation, as lessees, under a lease from one Suneo. The Gift Shop was closing out its business and through their president, one Jackson, they made an arrangement with the defendants whereby the latter were to purchase the fixtures of the Gift Shop for $300 and assist them in closing out their stock, and the defendants were to be given possession of the premises for the balance of the term which expired April 30, 1918. Under this arrangement the defendants moved some of their fixtures and goods into the premises and made a payment to the Gift Shop on the 5th or 6th of July. They agreed to pay rent for the premises to the landlord beginning August 1, 1917. The Gift Shop made no assignment of the

lease to the defendants. About a week after the defendants took partial possession of the premises, one Krohn, a real estate dealer in the neighborhood, telephoned Jackson, asking him if the premises had been rented to Meek, a haberdasher, and Jackson told him of the arrangements he had made with the defendants, but said he still had the lease in his possession. Krohn offered Jackson $1000 for an assignment of his lease with Cunee, saying he represented the plaintiff Krier, who was also a haberdasher in the neighborhood and Krohn said he was anxious to keep Meek and Meek from setting up another store of that character in the locality and would pay $1000 to accomplish it. On July 23rd the original lessee, the Gift Shop, executed an assignment of the lease in blank and delivered it to Krohn. This assignment was executed by Jackson, as president of the Gift Shop, and he delivered it to Krohn, as he testified, "on the understanding that he was to fill in the name of Ambrose J. Krier or the names of Krier and Miss Michaltree," who was a milliner in that neighborhood. The defendants took complete possession of the premises on the last Saturday in July which was the 27th or 28th. Some time before that date Jackson told them of his deal with Krohn. At the time of the negotiations with Krohn and also when he closed his deal with him, Jackson told him all about his arrangement with the defendants, and told Krohn he thought his efforts were "all nonsense", for he could not get possession. Krohn said they would pay $1000 for the assignment of the lease and if Jackson would assign it, they would "attend to the rest of it". The defendants paid the rent for the premises to the landlord Cunee, after

the month of July and it was accepted. Sometime later, it is not clear from the record, just when, the plaintiff or his agent wrote the name of The Spaulding Waist Shops into the assignment which Jackson had executed and purported to sell the lease to The Spaulding Waist Shops for a valuable consideration. The Spaulding Waist Shops were unable to obtain possession of the premises and their tender of the rent to the landlord was refused, and they brought suit against the real estate agents who had dealt with them (Krohn) for the consideration they had paid for the attempted assignment and after obtaining a verdict some adjustment of their claim was made in connection with which they assigned the lease back to the plaintiff Krier. This was on December 27, 1917, and thereafter on January 30, 1918, Krier demanded possession of the premises from the defendants. As he did not secure that possession, he instituted this suit on February 1, 1918.

There are certain disputed matters that should first be determined. That Krohn, in his dealings with Jackson, was acting as the agent of the plaintiff, admits of no possible doubt. Plaintiff's contention that he was shown to have been acting as Jackson's agent, by reason of the fact that Jackson allowed him to retain $100 out of the purchase price of $1000 paid by plaintiff for the physical possession of the lease, with the assignment form on the back of it signed in blank by the lessee, is untenable.

There is a further dispute as to the facts of which Krohn had notice when he attempted to purchase the leasehold interest on July 23. From a careful examination of the record we are of the opinion that it establishes the

fact that at that time Krohn, acting as plaintiff's agent in his attempt to keep the defendants from gaining a foothold as business competitors in that neighborhood, had notice of the fact that the lessee had made a contract with defendants whereby the latter were to take the leasehold estate for the balance of the term and that that contract had been executed in part both by the payment of part of the consideration which had been agreed upon and by the taking of partial possession by the defendants. That such partial possession had taken place and that the plaintiff knew all about it even before he opened negotiations with Jackson, is further shown by the fact that when his agent Krohn first talked with Jackson about the matter he told them that his client was this plaintiff and that his object in attempting to secure an assignment of the lease was to keep the defendants off that street as competitors of his. It seems to have been the partial possession of the premises, taken by the defendants under their agreement with the lessees, that caused the plaintiff to undertake to get an assignment of the lease, after inquiry by his agent Krohn disclosed the fact that the lease itself was still in Jackson's possession and that no assignment of it had been executed by him.

. The partially executed contract between the original lessees and these defendants had divested the former, of their leaseholdinterest and, of this, the plaintiff had notice through his agent. It was unnecessary that the defendants be accepted as a tenant by the landlord, in order to complete a divesting of a leasehold interest by the lessee. Wood on Landlord and Tenant, sec. 323. The cases

cited by plaintiff are not in point. They have nothing to do with the situation disclosed by the facts involved in this case. Counsel argues, "it would be a wierd result to hold that the assignment (delivered to Krohn) was void, leaving Jackson with both the thousand dollars and the leasehold." The assignment was not void. It was wholly inoperative to pass any part of the leasehold interest because at the time it was executed the lessee had parted with his interest through a contract with the defendants which had then been partly executed. The evidence shows that at that time, Jackson told Krohn he was foolish to make the deal he was proposing, for he couldn't get possession. But Krohn seems to have thought he was getting something by the deal. As we view the facts he got nothing.

The plaintiff has never paid any rent on these premises but he in turn assigned the lease and an offer of rent by his assignee to the landlord's agents was refused after which his assignee assigned the lease back to him. Immediately after the original lessee left the premises the landlord recognized the defendants as his new tenants and they paid him the rent monthly and he accepted it. In our opinion the possession of the defendants was lawful and proper and at no time did the plaintiff acquire any right to possession of the premises.

For the reasons stated the judgment of the Municipal Court is reversed.

REVERSED.

Reh'g denied April 3, 1919

526a

GEN. NO. 6747. OCTOBER TERM A. D. 1917. AG. NO. 7

KATE M. TILTON, Plaintiff in Error

vs.

GEORGE R. TILTON, Defendant in Error

214 I.A. 640

Error to the Circuit Court of Vermillion County.

GRAVES, J.

Plaintiff in error several years ago obtained a decree against defendant for seperate maintenance. No question is raised here as to the correctness of that decree. In the original decree the court awarded to plaintiff in error twenty dollars per month for her support and maintenance. Recently that order has been modified so as to require him to pay her fifty dollars per month, which amount she contends is grossly inadequate. She is prosecuting this writ of error. The only question presented for our determination is the adequacy of the amount awarded to her. She contends she should have $150 per month as a regular stipend and at least $225 for her solicitors fees.

As to the matter of solicitors fees there is absolutely nothing in the record from which this court can determine the amount of services rendered by her solicitors or what the usual customery and reasonable fee for services rendered was at that time in that county. We therefore express no opinion on that question.

It is disclosed by the testimony in the record that neither of the parties have any property; that the wife has no income; that the husband has an income of $3300 per year as postmaster at

Danville, Illinois; that the wife is in poor health, is totally deaf and has poor eyesight, with blindness as a possible if not probable result; that the husband is also in poor health having had an operation for some internal difficulty; that he is a lawyer and has realized from the practice of his profession from $1000 to $1200 per year for several years; that during the last year before the hearing resulting in the decree under consideration he received $400 or $500 from old law business that was completed during the year and that he writes for a paper and receives for that service in the neighborhood of $200 per year. Disregarding all other sources of revenue, the husband has a fixed and regular income of $3300 per year from the government which, unless recent legislation fails of its purpose,

will continue for life if he behaves himself. The husband claims he has not been able to lay up anything so far from his salary. If these parties lived together and together spent the whole $3300 in living expenses, which at this time could easily be done, it is only fair to assume that they would each have the benefit of an equal amount of this income. The fact that they are not living together is not the wife's fault, but is the fault of the husband. Where no special circumstances show the necessity for the expenditure of more money by one party than is necesary for the other to expend for the usual and ordinary living expenses, it has been considered equitable that the wife when living seperate

and apart from her husband without her fault may be awarded a full one-half of the income.

Wilson v. Wilson 102 Ill. 297, **Harding v. Harding** 144 Ill. 599, **Cash v. Cash** 180 Ill. App. 31.

The sum of $50 per month or $600 per year which the order under consideration awarded plaintiff in error is manifestly out of all proportion considering the needs of the parties. An order giving to the innocent invalid wife $125.00 per month or $1500 per year and leaving for the culpable husband $150 per month or $1800 per year besides all he receives from his law practice and from his newspaper writing will be no more than scant justice to the wife and certainly will not be more than the husband should pay.

The order and decree of the Circuit Court is therefore reversed and the cause is remanded to that court with directions to that court to enter an order requiring defendant in error to pay to plaintiff in error $125 per month until there is some change in the circumstances of the parties warranting a modification thereof.

Reversed and Remanded with directions.

Reh'g denied April 3, 1919

527a

GEN. NO. 6795. OCTOBER TERM A. D. 1917. AG NO 76

GEORGE E. CUTLER, Appellant

vs.

R. A. SNAPP, Et Al, Appellees.

214 I.A. 640

Appeal from the Circuit Court of Vermilion County.

GRAVES, J.

Appellant is a commission merchant in New York. Appellees were in business in Georgetown, Illinois, buying and shipping poultry and eggs. In the spring of 1912 Arthur H. Cutler, a brother of appellant visited appellees at Georgetown in the interest of his brother the appellant here, and solicited the shipment of eggs by appellees to appellant. Appellees claim that Arthur H. Cutler then agreed for his brother George E. Cutler, that of appellees would ship one or two carloads of eggs a week to him, George E. Cutler, he would guarantee a profit on them when they were sold in New York. Arthur H. Cutler denies making such an agreement but insists that he merely solicited shipments to be sold on commission. Almost immediately after this visit of Arthur H. Cutler, appellees began the shipment of eggs in carload lots to George E. Cutler, and as each car was shipped they drew on appellant for an amount somewhat less than the original cost of the eggs. These shipment continued and the sight drafts drawn against them were paid for some time, but the eggs were not all sold when received in New York, but some, if not all of them, were placed in cold storage, and when sold did not sell at a profit.

When the sight drafts were dishonored by appellant, appellee soon stopped shipping to him and on taking an account of the deal it was found that the eggs appellees had shipped to appellant had cost them $2321.41 more than had been drawn against them, and appellant claims that the sight drafts of appellees that had been paid amounted to $1176.25 more than the eggs had brought net. After much correspondence appellant brought this suit to recover what he considered an overdraft. The declaration consisted of the common counts. Appellees filed the general issue and gave notice of a counter-claim. The evidence of but two witnesses was taken as to the contract supposed to have been made at Georgetown, and those were Arthur H. Cutler for appellant and R. A. Snapp for appellees. Snapp testified

postively that a contract was made whereby Cutler guaranteed to sell all the eggs Snapp would ship at a profit to Snapp, and Cutler testified as postively that no such contract was made. There was other evidence in the case, but nothing that was directly corroborative of either of these witnesses on the question of whether or not the contract was made. Appellant contends that the claims of appellees are not supported by the weight of the evidence; that even if the contract was made as appellees insist, its provisions have been waived by the subsequent acts of appellees and that appellees deceived appellant as to the price paid for the eggs, all of which are pure questions of fact.

The jury whose special province is to judge of the credibility

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of witnesses and to weigh their testimony, saw these witnesses and heard them testify and believd that the contract was made as Snapp said it was and believed that all the other facts contended for by appellees were true and returned a verdict accordingly. The trail judge who also saw the witnesses and heard them testify had an opportunity to set aside that verdict but he did not do so. This court without the same advantages as the jury and the trail judge, after carefully reading all of the evidence in the record find it impossible to say that the verdict of the jury is manifestly contrary to the evidence. There being no other errors complained of the judgment of the Circuit Court is affirmed.

Judgment affirmed.

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Certiorari denied by Sup. Ct. June 1919

(528a)

Reh'g denied April 3, 1919

GEN. NO. 6824. OCTOBER TERM A. D. 1917. AG. NO.79

WILLIAM J. LEE, Appellee,

vs.

DANVILLE STREET RAILWAY AND LIGHT COMPANY, a corporation, Appellant

214 I.A. 641

Appeal from the Circuit Court of Vermilion County.

GRAVES, J.

Appellee recovered a judgment in the Circuit Court on the verdict of a jury for $5000 for the loss of his left hand and part of his left arm. The negligence charged against appellant is variously stated in several counts, but in substance was that its motorman failed to stop the car and permit it to remain stopped long enough to permit appellee who was a passenger thereon safely to alight therefrom, but started the same with a jerk which threw appellee to the ground with his arm on the rail of the track where it was run over and amputation made necessary.

The first contention of appellant is that the verdict is contrary to the evidence. It would serve no useful purpose to undertake a long analysis of the evidence. The jury heard it. That verdict is binding on this court unless it is manifestly against the weight of the evidence which in this case it is not.

It is next urged that the Court erred in not permitting appellant to prove on cross examination of appellee and by witnesses called by appellant that during the night before appellee was intoxicated. The accident occured after seven o'clock in the morning.

The rulings of the court in this respect were correct for two reasons; first, the time of the accident was too remote from the time it is claimed appellee was intoxicated to leave any inference that he was intoxicated at the time of the accident, and second, there were at least six persons besides appellee who saw appellee at the time of the accident. If he was intoxicated at that time it would have been an easy matter to prove it by those witnesses who had a chance to know and who undoubtedly did know what his condition really was as to being intoxicated or not. The proof offered would at the best have raised an inference as to what his condition was at the time of the accident. To have admitted it would have been to violate the fundamental rule that the best evi-

dence of which a case is susceptible must be produced. **C. & A. Ry. Co. v. Pierson** 184 Ill. 386.

It is next urged that the instructions given for appellee were wrong. The wording of some of them could have been bettered, but the correct rule was so frequently reiterated in the instructions given at the instance of appellant, that the jury could not have been misled by anything complained of in the instructions. Again two of the instructions complained of related to the measure of damages, and the damages awarder were so clearly within the measure of compensation that it is manifest appellant could not have been prejudiced thereby. Appellee was 43 years old at the time of the trail. His expectation of life by the recognized mortuary tables is about twenty-six years. Through those years he must make his way the best he can without his

hand and the lower part of his arm. He also is entitled to compensation for pain and suffering endured at the time of the accident and while recovering therefrom. He is elso limited to such work as he can perform with one hand. Appellant calls attention to the fact that appellee still has his elbow joint. True, he might have been hurt worse, he might have lost both arms and both legs, but it must be remembered that he is entitled to compensation for what he has lost, not what he has left.

One of the instructions complained of was on the question of the burden of proof. Instead of using the usual wording in such instructions this one stated the rule to be that the plaintiff was not bound to prove the allegations in his declaration by "any greater weight than a preponderance" of the evidence. The language employed states a correct rule of law, yet it is calculated to be misleading and in some cases might be sufficient to cause a reversal of the judgment, but the evidence in this case so surely predominated in favor of appellee that no harm can have resulted.

The other instruction complained of was on the question of what conduct on the part of appellee was necessary to constitute due care for his own safety and was correct both in form and substance.

There is no error shown in the record to which our attention has been called. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Reh'g denied April 8, 1919

(529a)

GEN. NO. 6830. OCTOBER TERM A. D. 1917. AG. NO.58.

MARY G. BELL, by the Peoples Bank, Her Conservator, Appellant,

214 I.A. 641

vs.

JOHN H. WOOD, ORA GRIDLEY, ET AL, Appellee,

Appeal from the Circuit Court of McLean County.

GRAVES, J.

Appellant had a dower interest in one-half of lands that sold in a partition proceeding for $23,600. She therefore was entitled to the use of one-third of property worth $11,800, or in other words, she was entitled to the use for life of property worth $3,933.33 1-3. She asked to have the present value of her life estate computed and turned over to her in cash. She was then 58 years old. The court figured the present value of her dower interest by the Carlisle table at the rate of 4% interest and found it to be $1,618.19. The only complaint that is made is that it should have been figured at 5% interest. The court took evidence as to what per cent net money loaned at the present time would produce, or in other words, what was the present earning value of money, and found, and the evidence shows, that it was not to exceed 3% net. The rule in this state is that the present value of a dower interest in the proceeds of lands should be based upon the earning value of such proceeds. **Marshall v. Marshall** 252 Ill. 568. The computation in this case was on a basis approximately 1% more than the earning value of such proceeds, provided the

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testimony offered on that subject is to be believed, and we see no reason for this court to disbelieve it. That being true, appellant has been decreed more than she is entitled to under the rule in the **Marshall** case. It is urged that the computation was made on the basis of a lower per centum than had been heretofore customarily used in figuring dower interests. That, if true, furnished no reason for reversing this decree so long as it was computed on the basis of the present earning value of the money or on one more favorable to appellant.

It is lastly complained of by appellant that the court erred in requiring the appeal bond to be filed within ten days from the time the appeal was allowed.

The point is well taken. Section 92, Chapter 110 provides that the time fixed for filing an appeal bond in cases of this character shall not be less than twenty days, and if appellant had been prejudiced by the error it would have been reversible. But no harm came from the error as the bond was filed within the time limit.

Appellee has entered a motion in this case for the allowance of damages on the basis that this appeal is being prosecuted for delay. We are not able to say that delay is or was the object of this appeal and that motion is denied.

The decree of the Circuit Court is affirmed.

Decree affirmed.

Reh'g denied April 3, 1919

(530)

GEN. NO. 6862. APRIL TERM A. D. 1918. AG. NO. 15

JOSEPH BRAYSHAW, Administrator Etc., Appellee

vs.

214 I.A. 641

JOHN E. TRISLER, Et Al, Appellant.

Appeal from County Court of Champaign County.

GRAVES, J.

This is an appeal by John E. Trisler from an order of the County Court of Champaign County for the sale of certain lands to pay claims against the estate of Guila P. Thompson, deceased, who was in her lifetime the owner of these lands. Appellant became the owner of such lands by deed from the master in chancery from whom he purchased it at a sale ordered in a partition proceeding conducted after the death of Guila P. Thompson, deceased, and prior to the filing of the petition in this case for the sale of the same to pay debts. He makes several contentions against the validity of the order appealed from.

First, it is claimed that it does not appear that there was not a sufficiency of personal estate of Guila Thompson to pay all her debts. The inventory in this estate contains no personal property and the testimony in this record shows there was none. The theory of appellant is that it was the duty of James P. Thompson, who was the first administrator of the estate and who was the son of the deceased Guila P. Thompson, and was a party to the partition proceedings in which appellant purchased the land and received from the sale of such lands

a distributive share, to have inventoried the money so received by him as personal estate of the deceased and available for the payment of her debts, and cites in support of that theory the case of **Wachsmith v. Penn. Life Ins. Co.** 241 Ill. 409. That case is not in point. It is there held that where an administrator owes the estate money and is solvent, the amount of his debt to the estate is treated by the Court as paid to the estate and as in the hands of the administrator and available for the payment of the debts of the estate. No such condition exists here. There is no proof that he owed the estate anything and ev en if he owed the creditors of the estate the duty of protecting their interests in the partition proceeding and by failing to do so made himself liable to pay their claims such liability would be to the claimholders and not to the

estate, and by no process of reasoning can the amount of any liability he may rest under to the claimholders be construed to be an asset of the estate. The proof abundantly shows a lack of personal estate to pay the debts

The second contention is that the debts have not been proven. In a proceeding like this, the record of a judgment based on a claim filed in the County Court is **prima facie** evidence of the debt, against the heirs and those claiming under them. **Stone v. Wood** 16 Ill. 177. **Hopkins v. McCann** 19 Ill. 113, **Mason v. Blair** 33 Ill. 194, **McGarvey v. Darnall** 134 Ill. 367. By the introduction of the record of the allowance of those claims, the burden of showing that they were not

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valid was cast upon those who dispute that fact. The objection to the Wallace claim that its allowance was irregular because Brayshaw was not at that time regularly appointed administrator **de bonis non.** but was merely acting as an administrator **de facto,** was not made in the County Court and cannot be raised here for the first time. **Crawford v. C. B. & Q. R. R. Co.** 112 Ill. 314. A general objection only raises the question of the relevancy of the evidence. **Gage v. Eddy** 186 Ill. 432. The specific objection now made was not interposed on the trail. Even if this claim has not yet been properly allowed, it is still a claim to be presented against the estate and as such is required by the statute to be mentioned in the petition to sell land and considered by the Court. Chap. 3 Sec. 149 R. S.

It is next contended that the claims are barred by laches and the statute of limitations. There is nothing in that contention. Guila P. Thompson died November 28, 1910. On December 14, 1910, James P. Thompson, the son of the deceased was appointed administrator. He filed no inventory until May 27, 1913. In that inventory no personal property and only part of the real estate left by the deceased, was listed. At that time every claim here listed had been filed.

On August 15, 1914, one Joseph Brayshaw, who was the owner of two of the four claims filed against the estate, and whose claims amounted to $425, while the other two amounted to $272.37, filed in the County Court a petition praying that James P. Thompson, administrator of the estate of Guila P. Thompson, deceased, be required

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to show cause why he should not proceed to pay the

claims against the estate, and why, if there was not sufficient personal property to pay the same, he should not proceed according to law to sell real estate to pay such claims, and for an order compelling him to do so. To this petition James P. Thompson filed his answer. Brayshaw also filed an amended petition in which he prays for the discharge of the said James P. Thompson as such administrator on the ground that he had removed from the state of Illinois. On the hearing of this petition the Court found that Thompson had removed from the state and on October 30, 1914, ordered that he be discharged as such administrator and that Joseph Brayshaw be appointed as administrator **de bonis non** of the estate and Brayshaw qualified as such administrator by filing his bond which was approved by the court, and on November 20, 1914, letters of administration were issued to him. On December 28, 1914, Joseph Brayshaw as administrator **de bonis non** filed his petition to sell real estate to pay the identical claims involved in this petition. To this petition appellant here filed his answer in which he denied the legality of the discharge of James P. Thompson as such administrator and of the appointment of Brayshaw on the ground of want of proper notice to James P. Thompson of the pending proceeding. James P. Thompson filed a similar answer and the Court on March 13 ,1915 upon a hearing of the petition, sustained the claim of want of jurisdiction; held that Brayshaw was not legally appointed and denied the prayer of the petition to sell land. On January 15, 1917, Brayshaw was again

appointed administrator **de bonis non** of the estate and twelve days later filed the petition here under consideration to sell lands to pay debts. The history of the administration of this estate is tiresome but serves to fully rebut the charge of laches on the part of the owners of the claims here involved.

The statute of limitations as to filing claims against estates does not run to prevent the allowance of claims filed after the time limit for filing claims has expired. and the satisfaction of the same out of property inventoried after the same were filed. **Sloo v. Pool** 15 Ill. 47. In this case as already stated all these claims were filed before the inventory was. These claims were therefore not barred by the statute of limitations.

It is next claimed that the court erred in permitting Dr. Brayshaw, the present administrator **de bonis non** to testify. When he was first put on the stand to

testify no objection was made to his competency. When he was recalled such objection was made and overruled. Some of his testimony in rebuttal was clearly admissible under the third exception to Section 2 of Chapter 51. It may be that while he was on the stand in rebuttal he testified to some things that were not strictly within the exception, but no objection was made to such improper testimony on the ground of the incompetency of the witness after the objection that was made when he first took the stand

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in rebuttal. The witness had the right to give his version of the conversation which Joseph H. Thompson had testified concerning, as having been had between him and Brayshaw, and the general objection to Brayshaw's competency as a witness was properly overruled. That was, however, not a ruling that he was a competent witness for all purposes, and if counsel for appellant had sought to preserve for review the question of his competency to answer particular questions, he should have made his objection in apt time. Besides all that, the trail was by the court without a jury and it is presumed that a court will only consider the competent evidence before it.

The next contention to be considered is that appellant under his deed from the master in chancery took the lands free and clear from any liens for the payment of the claims against the estate of Guila P. Thompson. The purchaser at a partition sale takes the property subject to the rights of the creditors of the estate to which the land belongs to have the same sold to pay the debts of the estate. At such sales the rule **caveat emptor** applies. **Hall v. Gabbert** 213 Ill. 208-217-218. **Wachter v. Doerr** 210 Ill. 242-245. **Sulton v. Read** 176 Ill. 69-81. **Bassell v. Lochard** 60 Ill. 164, 166-167.

The last claim of appellant is that the claims made the basis of the petition under consideration were really the obligations of Joseph H. Thompson, the husband of Guila P. Thompson, deceased, and should have been enforced against his interest in the lands in question. It may be he was jointly liable on all of these claims, but the evi-

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dence seems clear that she was primarily and seperately liable for them also, and even if the husband was jointly liable for them, no reason has been given and none suggests itself why a creditor of two persons who are jointly and seperately liable for a debt may not elect to proceed against either for the collection of the claim.

We find no reversible error in the record and the order of the County Court is affirmed.

Order affirmed.

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Rehearing denied April 3, 1919

(531a)

214 I.A. 641[4]

GEN. NO. 6888. APRIL TERM A. D. 1918. AG. NO. 39.

CHARLES E. FITZWATER, Appellee,

vs.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, Appellant

Appeal from the Circuit Court of Shelby County.

GRAVES, J.

Appellee brought this suit against appellant to recover damage for cutting down trees on his land. There were originally three counts in the declaration, but before the trail was concluded appellee dismissed suit as to the third count and the trail proceeded to verdict and judgment on the first and second counts of the declaration. The first count was in trespass and charged that the defendant cut and destroyed trees of the value of $1000 upon certain lands of plaintiff. The second count was in trespass on the case and charged that the defendant carelessly and negligently cut down and destroyed certain trees of the plaintiff of the value of $1000 then growing on land of plaintiff. To the first and second counts the defendant filed the general issue and to the first count it filed three special pleas; the first of these was a plea of leave and license, in this plea the manner in which the leave and license was given is not set out. The second special plea set out a contract in **haec verba,** a compliance by it, of the terms of that contract and concludes with the averment that plaintiff had thereby given it permission to do the acts charged. The third

special plea was a plea of release and waiver in which the same contract set out in the second special plea is again set out and relied on. This plea concludes with an averment of the payment by defendant to the plaintiff of $300 in consideration of the permission granted to the defendant in the contract set out in the plea. The plaintiff by his replications denied that he had given defendant any leave, license, consent or permission to cut the trees.

On the trail of the case the defendant offered in evidence a writing in most respects like the one set up and relied upon in its second and third special pleas, but in its most important and significient part it is so different as to make it absolutely clear that it is not the contract set out in the pleas. The concluding sentence before the attestation clause in the contract pleaded

is "No trees are to be cut without permission of grantor"s while in the instrument introduced in evidence as "Exhibit 1" the corresponding clause reads "No trees are to be cut without permission of the grantees." It is not for this court in this case to undertake to speculate on how the discrepancy occured. Both the abstracts of the pleas and of "Exhibit 1" as well as the records of the plea and the original writing which was offered in evidence and is made a part of this record, show the truth to be as stated. The contract pleaded prohibits the Public Service Company from cutting trees without the consent of the Fitzwaters, and the one introduced in

Page 2

evidence prohibits the cutting of trees by the Fitzwaters without the consent of the Public Service Company. It follows that the defendant failed to prove its second and third special pleas. In support of its first special plea, defendant offered proof of an oral consent of Fitzwater that the trees might be cut and a license or permission to it, to cut them. This Fitzwater and his daughter emphatically denied. It was the province of the jury to determine which side told the truth. In the exercise of its prerogative, the jury found that issue for the plaintiff, and assessed his damages at $500. A motion for a new trail was overruled and judgment was entered on the verdict.

The verdict was not against the manifest weight of the evidence. Neither was it error for the court to refuse to give the peremptory instruction asked for by defendant. There was ample proof which taken by itself established the plaintiff's right to recover. **Libby, McNeil & Libby v. Cook** 222 Ill. 206.

Three of defendant's instructions were modified by the Court and given as modified. They should all have been refused as presented, in view of the fact that there was no proof in the record in support of the second and third special pleas of defendant. Even as modified they were all more favorable to defendant than can be justified. The error in giving them as modified was against the plaintiff. If the verdict and judgment had been against the plaintiff, it would likely have been reversed for the giving of

Page 3

these modified instructions, but the error is not available to defendant.

A motion to strike Fitzwater's testimony on the question of the amount of the damage done to his farm

by the cutting of the trees was denied. The basis of the motion was that the witness had not shown sufficient knowledge to qualify him to express an opinion as to the depreciation of the farm by the cutting of the trees, in view of the fact that he said he did not know what the fair cash market value of the farm was immediately after the trees were cut. The record shows, although it is not abstracted, that the witness said the land at the time he was testifying was worth about $225 per acre, and that it was then worth $10 or $15 more than when the trees were cut by reason of the general appreciation of land values. It also shows that he was a man of mature years, old enough to have a grown daughter, and that he was a large land owner in that township, having land in at least four different sections. His opinions were admissable. It was for the jury to say how much weight they were entitled to. The motion was properly denied.

It is lastly argued that the damages awarded were excessive. All the testimony in the record as to the amount of damage was offered by plaintiff. Three of his witnesses placed the damage at $500. Twenty-nine trees varying in size from 6 to 16 inches in diameter, mostly hickory, but including two black walnuts, were cut. There is no basis from which this court can determine that the damage awarded was too great.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Reinstated April 3, 1919

532a

GEN. NO. 6914. APRIL TERM A. D. 1918. AG. NO. 60.

BERT FERGUSON, Appellee,

vs.

JERMIAH GRACE, Appellant

642

214 I.A.

Appeal from the Circuit Court of Macon County.

GRAVES, J.

Appellant was in possession of lands in controversy during his father's lifetime. After the death of his father he paid rent to the trustees under his father's will from 1913 to March 1, 1917, without any written lease from them. On December 20, 1916, a written notice signed by those trustees, that they had elected to terminate his tenancy on March 1, 1917 and for him to quit and deliver up possession of the premises by that day, was served on him by a constable of Macon County. On January 8, 1917, the said trustees leased the said premises to appellee for the term of one year beginning March 1, 1917 and made, executed and delivered to him a written lease for the same for said period of time. Possession of said premises were not delivered up by appellant on March 1, 1917, and on March 2nd this suit was commenced by appellee before a justice of the peace in Macon County under the forcible entry and detainer act to recover possession of the lands here in question and also a tract of land in Moultrie County. The justice of the peace gave judgment for appellee for all the land described in the complaint. Appellant appealed from that judgment to the Circuit Court of Macon County, where upon motion he was given leave to amend the papers by

striking therefrom the land in Moultrie County, and after a trail the Circuit Court gave judgment for appellee for possession of the premises in Macon County and against appellant for costs. Appellant has appealed from that judgment to this court. Three points are made by appellant for a reversal of that judgmen. The first point is that the complaint before the justice of the peace included lands outside of the jurisdiction of the justice and that for that reason the whole proceeding was void. A trail of a case in the Circuit Court on appeal from a justice of the peace is a trail **de novo** and the Circuit Court has all the authority to permit the amendment of the papers either in form or substance that the justice of the peace would

325 - 24252

BERTRAM HENRY STEDWELL, a minor, by John Stedwell, his next friend, Appellee, vs. CITY OF CHICAGO, SANITARY DISTRICT OF CHICAGO, COMMONWEALTH EDISON COMPANY and SOUTH SIDE ELEVATED RAILROAD COMPANY, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 642

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, a minor, by his next friend, brought suit against the City of Chicago, the Sanitary District of Chicago, the Commonwealth Edison Company, and the South Side Elevated Railroad Company, to recover damages for personal injuries suffered by him in coming in contact with an electric wire. The case was dismissed as to the Commonwealth Edison Company and the South Side Elevated Railroad Company. There was a verdict in plaintiff's favor against the other two defendants for $25,000. A new trial was awarded the Sanitary District of Chicago, and judgment was entered on the verdict against the City of Chicago, to reverse which it has appealed to this court.

The record discloses that the elevated railroad runs east and west in 40th street and crosses Langley avenue, a north and south street; that the City of Chicago maintains an electric arc light wire stretched along the south side of 40th street, which passes under the elevated structure

at the intersection of Langley avenue. The wire is supported along 40th street by means of poles, twenty-five feet above the level of the street, and at the elevated structure the wire dips down under the structure, to which it is attached. The elevated road at Langley avenue is supported by means of iron posts set in concrete. The posts rest on a stone or cement foundation, about a foot and a half above the sidewalk. Upon two sides of the posts are iron cross-bars about a foot apart, which form a kind of lattice work or ladder, extending from the foundation to the top of the posts. The posts were set in the sidewalk near the inner edge. Wooden cross arms were attached to the iron posts and to these cross arms the electric wire was attached by means of glass insulators, and was about ten inches from the posts. The wire wasthirteen feet above the sidewalk. The wire was covered by a weather proof compound, but was in no manner insulated so as to protect anyone coming in contact with it. It carried an electric current of about 4400 volts.

At the time of the accident plaintiff was eleven years, seven months and thirteen days old, and on the evening of April 29, 1915, he and several other boys had been attending an entertainment at Lincoln Center, which was located about two blocks from where he lived. The entertainment was over about 9:30 o'clock and he started home in company with another boy. When they neared the intersection of 40th street and Langley avenue, they saw some boys with whom they were acquainted playing tag. Plaintiff and his companion were invited to join the game and did so, and in playing the game in trying to prevent being

of the Independencia of Insight version. His aim is unmasked along with their assert to cause of peace, demonstrate the fact that among the Israel at the victory, one of the distinctive characteristics has also been which the expansion, by which it is attached. The distinctive great of Insight cannot be separated by means of lets yields and in countries. The truth exist in a place or another Truth-seeking, where a fact and a half cause the atomic. Then we allow of an-perhaps are also mathematics which a fact apart, which fact is left of lifting very or longer, separated from the Foundation is not fit of the point. The great work-not is-is wholly such the kind-fact. Jewish cause some more without in the also point not to state more also the chemists when one standing of cause or place intelligible, and one about not some Come the point. The also mathematics that lower to relevant. The also was worked by a weather usual mathematics. Yet not is in number involved on so to practice means coming in one that also is. It moved on chemists measure or about kind years.

At the time of the anatomist physicist one always great, arrive months and chemist days old, and in the time of April 30, 2004, he has arrived which have had been attached or mathematics as lifetime course, which the Israel about the Kinds Jews place to life. The mind without the case lower first fact-point and to started been by changing with meaning has. Then just moved the intro-position of Jews years, and Insight movement. Also was some have with some they not connected physics Jew. Finally the six movement some Jewish to Jews the lower and the

tagged, plaintiff climbed up the iron post under the elevated railroad and came in contact with the live wire, was burned, fell to the ground and was severely and permanently injured. He was removed to a hospital, where it was found that his two hands were badly burned, also the soles of his feet, and his skull was fractured as a result of the fall. His right hand was practically burned off and his left hand considerably scarred and impaired. It appears that at the time of the accident plaintiff was in the 5th grade, and at the time of the trial, October, 1917, he was again in school but still in the same grade. No complaint is made that the judgment is excessive, nor that the instructions of the court did not state the law correctly, and there is no conflict in the evidence.

The city, however, contends (1) that it was not shown that there was any negligence in the maintenance and operation of the electric wire, and (2) that in the maintenance and operation of the wire the city was exercising a governmental function, and in such case it is not liable for the negligence of its servants.

First. Considerable has been said by counsel on both sides as to whether the maintenance and operation of the wire under the circumstances shown, constitute what is known as an attractive nuisance, and numerous cases are cited. In the view we take of the case we think this argument is immaterial and does not in any way aid in the solution of the matter before us. The controlling question is: did the city exercise that degree of care in the maintenance of this wire that the law imposes upon it. Persons and corporations handling the dangerous and deadly agency of electricity are

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[illegible]

bound to the very highest measure of skill and care. As said by our Supreme Court in Hausler v. Commonwealth Electric Co., 240 Ill. 201: "Electricity is a silent, deadly and instantaneous force, and a person or company handling it is bound to know the dangers incident to its use in a public street or alley, and is bound to guard against accident by a degree of care commensurate with the danger incident to its use." As there is great danger and hazard in the use of electricity, there must be a corresponding exercise of skill and care, for the purpose of avoiding injury to another, to constitute what the law terms ordinary care. The care must be commensurate with the danger. Commonwealth Electric Co. v. Melville, 210 Ill. 70. The question, therefore, in the instant case is whether the city exercised that degree of care in the maintenance of this live wire which the circumstances demanded. The question of negligence is generally one of fact to be determined by the jury, and only becomes one of law when all reasonable minds would reach the conclusion that there was no negligence. In the instant case, can it be said that all reasonable minds would reach the conclusion that the city had exercised ordinary care under the circumstances? We think not, and therefore the case was properly submitted to the jury.

The evidence discloses that small boys played around and upon these posts under the elevated structure for some years prior to the accident. There was some evidence that tended to show that it was not feasible to so insulate the wire that it would not be dangerous, but it is quite obvious that boys would climb upon these posts, and we see no reason why this deadly wire carrying 4400

based in the very national memory or still not done.

As said by our Supreme Court in Dunlop v. Bonnyscotsville Distillery Co., 201 Ill. 603: "Adulteration is a wilful, deceitful and dishonorable fraud, and a person so engaged in selling it is bound to take the dangers consequent to the use in a public manner of alcohol, and he cannot be heard against evidence of a defect of this nature coupled with the danger incident to its use." In Illinois he cannot hide behind and demand in his own of ignorance, there must be a corresponding warranty of well and sound, for the purpose of enabling injury to another, to substitute into the law another authority only. The mere fact he substitutes with the vendor. Commonwealth Distillery Co. v. Dunlop, 201 Ill. 73. The question, therefore, in our instance case is whether the only remedies that exists of such in the relationship of this case take place which the commonwealth remedies. The question of negligence is essentially one of fact to be determined by the jury, and only because one of law when all reasonable minds would reach the conclusion that there was no negligence. In the instant case, we do be sure that all reasonable minds would reach the conclusion that the only and reasonable evidence was simply that negligence. Of course not, not substitute the same was generally established in the law.

The engineer discovers that well, bugs change around and been there needs means the necessary situations the same place prior to the accident. There was also testimony that showed to show that it was not feasible to include the wire that it would had by negligence, but it is quite evident that bugs would which were there prior, and he was no reason not this doubt when nothing still

volts of electricity could not have been placed a little further from these posts out of the reach of boys. This obviously would not be a difficult task. The cross-bars, or lattice work, on the iron posts could have been removed, and a number of other ways of avoiding the danger suggest themselves at once. We think it clear therefore that the question of negligence was proper for consideration by the jury.

Second. It is argued that the city in maintaining the wire in question was acting solely in its governmental capacity, by virtue of the police power, and therefore there is no liability. Whether a city is acting in its governmental or ministerial capacity depends upon the character of the work in which it was engaged at the time. Under the facts developed by the evidence, we think it clear that in the maintenance of the wire in question, the city was acting in its ministerial capacity. Devine v. City of Chicago, Gen. No. 24682, Appellate Court, First District; Johnston v. City of Chicago, 258 Ill. 494. In the Devine case it was held that the city was acting in its ministerial capacity and not exercising a governmental function in maintaining a police fire alarm wire. Likewise in the Johnston case it was held that the city in operating an automobile in connection with its public library was acting in its ministerial capacity. These authorities, we think, are controlling in the instant case.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

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[illegible]

[illegible]

The Economic of the Circuit Court of Cook County is efficient.

339 - 24266

JOSEPH DAMATO, a minor, by Andrew Damato, his father and next friend, Appellee, vs. CONSUMERS COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

214 I.A. 642

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Joseph Damato, by his father and next friend, brought suit against the Consumers Company to recover damages for personal injuries. There was a verdict and judgment in his favor for $6,500 to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff at the time of the accident was a boy about seven and a half years old, and his theory of the case was that at the time of the accident he had been playing marbles along the east curb line of Federal street between 47th and 48th streets; that he and his companion Carl Sansone were lying down to rest on the grass plot between the curb and sidewalk, when an automobile truck loaded with coal belonging to the defendant and operated by one of its servants came east in 47th street and turned south in Federal street; that the truck ran south near the east curb line and struck plaintiff's right leg, injuring it so that a few days

thereafter amputation was necessary; that the driver of the truck did not sound any horn or give any signal, and that the plaintiff did not see the truck until it was a foot or two from him, when it was too late for him to avoid being struck.

On the other hand defendant's theory was that the truck loaded with coal was going east on 47th street, and just before it reached Federal street, the plaintiff ran from the north side of 47th street south from behind a westbound street car and collided with the truck.

47th street extends east and west and a double line of street cars are operated in it. It is intersected at right angles by Federal street, which extends north and south. In the view we take of the case it will not be necessary for us to consider but one contention made by the defendant, viz; that the verdict is against the manifest weight of the evidence. The undisputed evidence is that the accident occurred about half past two or three o'clock in the afternoon on the 10th of April, 1914, and that the day was bright and clear.

Stella Farrara, a witness for the plaintiff, testified that she knew plaintiff; that the accident happened about half past two or three o'clock in the afternoon; that she was going to the butcher shop on 47th street east of Federal street; that she was about half a block east of Federal street on 47th street, when she heard a boy crying and turned around and went to the corner of 47th and Federal streets and saw that plaintiff was hurt; that he was near the east curb line of Federal street between a

frame building which stood on the corner and a building occupied by a restaurant adjoining; that a truck of the defendant company stood at the alley between 47th and 48th streets on the east side of Federal street; that there were men gathered around the boy who took him across the street to a building occupied by a saloon on the southwest corner of Federal and 47th streets; that he lived with his parents near the alley on the east side of Federal street and that she ran to call his mother; that his mother was not at home, and witness then went to a grocery store on 49th and Federal streets where she informed his mother of the accident; that she did not pay much attention to who picked the boy up; that there were a great many people there and that she was excited.

Charles Jackson, who was a driver of an ash wagon, testified he saw the accident; that at that time he was living at 49th and Federal streets and was working for the Aldrich Coal Company whose office was at that time on the west side of Federal street between 47th and 48th streets; that there was a building occupied by a market on the southeast corner of 47th and Federal streets, and south of that a restaurant in front of which the boy was playing and near the alley; that he saw plaintiff before he was hurt playing in the dirt near the curbstone shooting marbles; that another boy about his size was with him; that the witness was standing in front of the coal office and was thinking of going over to the restaurant to get something to eat; that the truck came east on 47th street and turned south along the east curb line and struck the boy who at

that time was lying on his stomach; that just as the truck was about to strike the boy, witness turned his head as he was afraid the boy would be killed; that a few minutes later he looked back and saw the men picking the boy up; that then his boss called him and he did not pay any further attention; that he did not know the boy or notice the kind of truck or whether it was loaded or unloaded; that the accident occurred about three o'clock in the afternoon; that witness had been delivering coal and had just driven his team into the yards; that there were two men on the truck in front, but he did not see any men on the back of the truck; that he did not notice the color of the truck; that the truck was going at an ordinary gait; that he did not see it until after it turned into Federal street; that the boy was lying on the curbstone when the truck struck him; that the boy had been shooting marbles; that he afterwards found out the boy's name and saw his father who sometimes comes to witness' house; that it was a bright sunshiny day.

Maggie Williams testified that she was an Italian woman and had a family and lived near plaintiff's family, although she did not know them at the time of the accident; that at the time of the accident she was at the meat market on 47th street, near Federal street; that when she was coming out of the market she heard screams and saw the boy was injured; that he was then near the east curb on Federal street near the restaurant; that the men picked the boy up and took him across the street in front of the saloon on the southwest corner of 47th and Federal streets; that afterwards the men took the boy back to the east side of the

street where he lived; that there was a truck standing on the east side of Federal street, and there was a crowd of four or five people there when she first heard of the accident.

John Lynch testified he was a plumber; that at the time of the accident he was going south on the west side of Federal street; that he saw the truck coming up the hill east on 47th street with a load of coal; that it turned south along the east side of Federal street; that there were two men sitting on the front of the truck; that when the truck turned he was "right on the corner of 47th and Federal streets;" that he heard somebody "holler" and the truck stopped, the driver got off and picked the boy up; that this was on the east side of Federal street; that he had never seen the boy before but he saw him about a year afterwards; that the truck was a large yellow truck with the sign "Consumers" on it; that the truck stopped about two feet from the east curb headed south.

Andrew Damato, the plaintiff's father, testified that the boy was born in Chicago November 30, 1926.

Jim Patrice testified he knew the boy and at the time of the accident the boy's family lived in the witness' house; that at the time of the accident the witness was working in the basement when Mrs. Ferrara called him; that he came out of the house and saw the boy and the truck on the east side of the street; that they took the boy over to the saloon; that the truck was on the east side of Federal street near the alley; that he told the men who the boy was and where he lived.

Carl Sansone, who was fourteen years old at the time of the trial, testified that he was with plaintiff at the time of the accident; that they were lying down near the east curb of Federal street, between 47th and 48th streets; that they had been playing marbles, coming up on the east side of Federal street from 48th street; that when they got near the restaurant they sat down; that plaintiff's legs were out over the curb into the street; that they were talking with each other; that "I heard a noise like an automobile coming and I switched my legs;" that he did not have time to warn plaintiff; that the truck caught plaintiff's leg before he could warn him; that the men backed up the truck and picked up the boy and took him over in front of the saloon; that it was a Consumers loaded with coal; that no sound of a horn or warning was given of the approach of the truck; that witness still plays with plaintiff; that he was eleven years old at the time of the accident; that at that time he attended Coleman school; that it was a nice day but he did not go to school that day, although it was a school day; that his and plaintiff's parents occasionally visit each other; that at the time of the accident the witness was in the third or fourth grade; that he was in school the day before and the day after the accident; that plaintiff had not been on 47th street that afternoon and that he was not knocked down on the southwest corner of 47th and Federal streets by the truck.

Dr. I. S. Lewis was called to attend the boy shortly after the accident, and in going to answer the call he noticed a large motor truck facing south on the east side

of Federal street about seventy feet south of 47th street; that he made an examination of the boy and found the skin torn from the outside of the boy's leg, running from below the knee to the ankle. The bones were not injured. He ordered the boy taken to a hospital and dressed the wound, but a few days later infection set in so that amputation was necessary. The doctor was the family physician and treated the boy before.

Some of the witnesses for the plaintiff testified that they did not see any boy rolling a hoop across 47th street at the intersection of Federal street and that plaintiff was not injured at that place.

On behalf of the defendant, the evidence tends to show that the truck in question was a two and one half ton truck and was loaded with bags of coal; that it left the defendant's yards at 47th street and Normal avenue and was going east on 47th street to 4745 Greenwood avenue, which is about a mile east of Federal street and just south of 47th street; that the driver and another man were sitting on the front seat and on the rear four men were sitting on the bags of coal. Five of these men testified, the other one having died prior to the trial. Each of them swears that the truck was going east on 47th street in the eastbound street car track, or as one of them put it, one wheel between the rails and the other to the south; that the truck was going about eight miles an hour; that there was an incline up to Federal street and just before the truck reached the west side of Federal street, a westbound street car was crossing Federal street; that plaintiff ran south

across 47th street on the west crosswalk just behind the street car, trundling a hoop and collided with the truck, some of the witnesses testifying the north front wheel and some the rear wheel struck the boy; that as soon as the boy came in view from behind the car the driver of the truck tried to avoid him by turning sharply to the south; that the boys leg was run over or pinched by the truck; that the truck was immediately stopped, the boy picked up and his leg bandaged with a handkerchief; that the boy was taken to the steps of the building formerly occupied by a saloon right at that corner (southwest corner, 47th and Federal streets); that afterwards when they learned where the boy lived he was taken east across Federal street to his home and the doctor came and ordered him taken to a hospital.

Leo Edmonds, John H. Sherred and Charles Gibbard, each testified that at the time of the accident they were going west in 47th street on an autotruck belonging to the Thomas Susack Co.; that as they approached Federal street, there was a westbound street car in front of them; that it stopped to discharge passengers and as it started up and had about reached the west crosswalk of Federal street, they saw plaintiff run behind the street car south across 47th street and collide with the north wheels of defendant's truck; that plaintiff was trundling a hoop at the time; that the truck turned sharply to the south in an endeavor to avoid the boy; that as soon as the boy was injured it stopped, the men got off and took the boy to the steps of the saloon.

William Meyers testified that he saw the accident;

that he was a teamster working for the Aldrich Coal Co. at the time; that this company's coal yard was on the west side of 47th street about midway between 47th and 48th streets; that he drove out of this coal yard to the east side of Federal street and turned north in that street; that when he was about thirty feet south of 47th street defendant's truck was making the turn from 47th street around the southwest corner into Federal street; that he saw the boy falling just as he was struck by the truck; that the accident happened right at the southwest corner of 47th and Federal streets.

There was considerable controversy as to whether the coal truck after the accident stopped on the east or west side of Federal street, plaintiff's witnesses testifying to the former and most of the defendant's witnesses testifying to the latter. Counsel for plaintiff, in an endeavor to discredit the witnesses for the defendant, point out discrepancies in their testimony as to what part of the truck struck the boy and as to where he was when he was picked up, and the further fact that one or two of the witnesses for the defendant testified that the truck after striking the boy proceeded to the southeast corner of the intersection of 47th and Federal streets. There is some discrepancy in the details, yet they all testified substantially the same as to where the boy was injured, viz; near the southwest corner of the two streets. Plaintiff did not testify. At the time of the injury he was about seven and a half years old. There were only two witnesses for the plaintiff who testified they saw the accident,-- the witness Jackson and the boy Sansone. Jackson's testimony

is not very satisfactory and the Sansone boy was a playmate and friend of the plaintiff. If the accident occurred as plaintiff contends it did, it was a most extraordinary occurrence. The witnesses for the defendant in the vital particulars, told a straightforward, reasonable story. The three witnesses on the Cusack truck were intelligent men and entirely disinterested. Counsel for plaintiff attempts to explain away their testimony by saying that they probably saw another accident, but we think the facts do not warrant such an explanation. Defendant's truck was going east on 47th street, the point of destination being about a mile east of Federal street and a few doors south of 47th street. The ordinary course would be for the truck to go straight down 47th street, which the witnesses testify it did after the accident. There was no reason why it should turn down Federal street except the one given,-- to avoid the boy, and after he was injured to pull out of the way of the traffic until the boy was taken care of. There is no dispute that after the accident the truck was turned and continued its trip east on 47th street to the place where the coal was to be delivered. The evidence all shows that the truck was going at a very moderate rate of speed. The testimony of all the witnesses is that immediately after the boy was injured he was carried to the southwest corner of the streets, the natural place if the defendant's version of the accident is true, and an unusual place if plaintiff's version is correct. If the boy was injured on the east side of the street in front of the restaurant, there is no reason why he should have been carried across the street in front of a vacant building formerly occupied by a saloon. The

Sansone boy testified that he knew where the boy lived, was right by his side when he was injured, and yet he says they took him across to the opposite side of the street and away from his home; and while this witness was a young boy and may have been frightened, yet he testified he stayed around there for ten or fifteen minutes.

The accident was a most unfortunate one, and plaintiff has been severely and permanently injured. He was a young boy and we can only account for the verdict of the jury on the theory that it was the result of sympathy and compassion for him; and while we appreciate, of course, the fact that the boy was young and severely and permanently injured, yet under the law, this does not warrant a verdict in his favor, and after a careful consideration of all the evidence in the record, we have reached the conclusion that the verdict is against the manifest weight of the evidence.

The judgment of the Superior Court of Cook County is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as an ultimate fact that the plaintiff was injured near the southwest corner of 47th and Federal streets, Chicago, and that the defendant in the operation of its truck was guilty of no negligence.

[illegible]

[illegible]

[illegible]

60 - 24351

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MARTIN KRAUSE,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

214 I.A. 642

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Martin Krause was found guilty of practicing medicine and surgery without a license in violation of the statute regulating the practice of medicine and surgery in this state, and was fined $100.

He first contends that the information does not charge a violation of the statute, in that it is indefinite and uncertain; that it charges the defendant (1) did without being licensed so to do treat human ailments and (2) did treat one Miss Morley by rubbing and by laying on of hands. It is said that the information consists of two counts; that it charged the defendant with treating human ailments "without stating what ailment, whose ailment and what he did as constituting such treatment." We think this is a misapprehension. The information charges that the defendant, not being licensed to treat human ailments without the use of drugs and without operative surgery, did treat human ailments without drugs or medicine or operative surgery, by rubbing and laying on of the hands on Miss Morley. We

think it clear that the information charged the defendant with treating Miss Morley for human ailments by rubbing and laying on of hands without being licensed, contrary to the statute, and that the information is not subject to the objection urged.

It is next urged that the treatment of human ailments by mental or spiritual means may be done without a license, as it is not within the purview of the statute; that as the evidence shows the defendant professes to cure by spiritual means, the statute does not apply.

The statute which the defendant is charged with having violated is an act "in relation to the practice of the art of treating human ailments." Chap. 91 R. S. Section 2 of the act forbids the practice of medicine and surgery or any system or method of treating human ailments without the use of drugs or medicine or without operative surgery, without a license. Section 20 provides: "Any person shall be regarded as practicing medicine or treating human ailments within the meaning of this act, who shall profess to treat, operate on, or prescribe for any physical ailment, or physical injury to, or deformity of another." It is also provided that section 20 shall not apply to "the treatment of the sick or suffering by mental or spiritual means without the use of any drug or material remedy."

The record discloses that two women inspectors employed by the city of Chicago, called at the defendant's house in Chicago and found him treating an old man; that they met there the defendant's wife who was known as Mrs. Westergren, and one of them told her that she wanted a

reading. Mrs. Westergren gave her a reading, and in doing so, told her that she had lung trouble. The inspector told her she did not think she had that trouble, but if the reader had told her she had stomach trouble she might believe her. Mrs. Westergren then said it did not make any difference what her trouble was, that they were giving treatments that would cure her; that her husband would give her the treatment for 50¢; that they then came out where the defendant was, and the witness was told to sit down and remove her hat. The defendant then manipulated the witness's back and shoulders for ten or fifteen minutes, put his head to her shoulders and listened, and asked her if she did not feel better; that he charged and was paid 50¢.

The defendant testified in his own behalf that he healed through the influence of the spirits,-- mental and spiritual healing -- that he laid on his hands and asked the deity to make the sick person well; that he gave the treatment to Miss Morley. Defendant was then asked if she had anything the matter with her, and replied that Miss Morley had told his wife, at the time she was giving the reading, she had stomach trouble.

It is argued by the defendant that he did not treat Miss Morley for any physical ailment, because she did not in fact have any ailment, as she testified herself that she was perfectly healthy, and since he treated no human ailments there was no violation of the statute. This court said in People v. Moser, 176 Ill. App. 625, where the facts and the argument were substantially the same as here:

"The statute evidently means to include any person who undertakes to prescribe for or treat a patient for any ailment, regardless of the real or fancied presence of the ailment." We think it was not a defense that the inspector did not in fact have any human ailment, for the evidence shows that the defendant professed to treat her for a human ailment, and this is clearly covered by the statute. The defendant did not come within the exception quoted above from section 2[illegible], for the reason that he undertook to treat the inspector by the laying on of hands. People v. Trenner, 144 Ill. App. 275.

From what we have said it is clear that there was no error in the refusal by the court to give instructions 2, 3 and 4 asked for by the defendant.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

105 - 24410

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. LEOPOLD OESTERREICHER, Plaintiff in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

214 I.A. 643

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal plaintiff in error, Leopold Oesterreicher, seeks to reverse an order entered by the Superior Court of Cook County, adjudging him to be in contempt of court and ordering that he be committed to the county jail for a period of fifteen days. The contention of the people was that in a civil suit in which the respondent was defendant and which was on hearing before the Honorable Oscar Hebel, a Judge of the Superior Court of Cook County, a certain exhibit was altered by respondent after it had been introduced in evidence. On the other hand, the respondent's position was that the alteration was made before the exhibit was introduced in evidence.

The record discloses that after the trial of the civil suit, a verified petition was filed by one Julius Hecht, who was plaintiff in that case. The petition averred that the exhibit had been changed by the respondent after it had been introduced in evidence. A rule was entered on respondent to show cause why he should not be adjudged in contempt of court, and in compliance with the rule, respon-

dent filed his sworn answer wherein he denied that he had altered the exhibit after it was introduced in evidence; set up in detail the change that he made in the exhibit and averred that the change was made prior to the time it was introduced in evidence. Afterwards the motion of the respondent to be discharged on his answer was denied, and over objection, the court proceeded to take testimony. Evidence was introduced by both sides tending to sustain their respective contentions, and after the hearing the court adjudged the respondent guilty of the contempt charged and imposed sentence.

The respondent in his answer set up that the alteration in the exhibit was made by him during the noon adjournment of court in his lawyer's office, and there is no contention that it was not made at that place. In these circumstances, it is clear that the contempt, if any, is what is designated as constructive contempt, and the sworn answer setting up that the change was made before the introduction of the document in evidence purged him of contempt, and it was erroneous to enter into the hearing of evidence, but respondent should have been discharged on his answer. People v. Seymour, 191 Ill. App. 381; same case affirmed, 272 Ill. 295; Dahnke v. People, 168 Ill. 102; People v. Gard, 259 Ill. 238.

Counsel for the people, however, contend that the contempt was direct, and that in such case the answer does not purge the defendant, but that the court can inquire into the matter. We think this is a misapprehension. Where the act constituting the contempt is committed in the actual presence of the court "while sitting as such, or so near the court as to interrupt its proceedings", it is designated direct

[illegible] the [illegible] [illegible] [illegible]

contempt. People v. Seymour; Dahnke v. People. Such contempts are punishable in a summary way, without any preliminary affidavit, process or interrogatories, for the reason that in all such cases the facts constituting the contempt are within the personal knowledge of the court, so that no evidence is necessary as no issue of fact is to be decided, for the court acts on its own knowledge. The proceeding in the instant case, being criminal in its nature, no issue of fact can be tried by the court. If the respondent denies the charge against him, it is conclusive and he is entitled to his discharge. On the other hand if he admits the material facts to be true, and they constitute contempt, punishment is imposed, but in either case no issue of fact is or can be formed. People v. Seymour. If the answer is false, the respondent is subject to indictment for perjury. Hake v. People, 230 Ill. 174. In the instant case, therefore, it clearly appears that the matters which are set up as constituting the contempt were not known to the trial judge, but were only brought to his knowledge by the petition, answer and evidence. Clearly this was not such a contempt as could be proceeded against in a summary way, and since the answer of the respondent purged him of the charge, it was improper to take testimony, but he should have been discharged on his answer.

The order of the Superior Court of Cook County is reversed.

ORDER REVERSED.

55 - 24897

RALPH S. PIPER,
Defendant in Error,

vs.

MINNIE E. PIPER,
Plaintiff in Error.

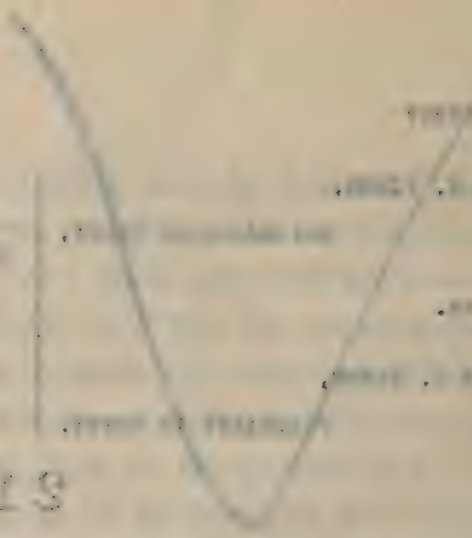
ERROR TO
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 643

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Minnie E. Piper sued out a writ of error to reverse a decree of the Circuit Court of Cook County. To the writ of error the defendant in error has filed a plea of release of errors. A replication was filed to which defendant in error has interposed a demurrer. The replication does not traverse any of the matters set up in the plea. The case will therefore be considered as if the plea had been demurred to. Trapp v. Off, 194 Ill. 287.

The record discloses that on November 16, 1917, Ralph S. Piper, defendant in error, obtained a decree of divorce against his wife Minnie E. Piper, plaintiff in error, on the ground of willful desertion, and by the same decree plaintiff in error's cross-bill, whereby she prayed for a decree awarding her separate maintenance, was dismissed for want of equity. The decree further provides that defendant in error pay to plaintiff in error $12 per week as alimony until the sum of $1900 had been paid, and also solicitor's fees. Afterwards on the same day plaintiff in error prayed



for and was allowed an appeal to this court upon filing a bond in the sum of $200 within 30 days and a certificate of evidence within 60 days. The bond was afterwards filed and approved. No certificate of evidence was filed. On the 4th day of March, 1918, the parties entered into a written agreement which is set up in the plea. It recites the decree and proceedings in the divorce suit, together with the prayer and allowance of an appeal, and the giving of the bond by plaintiff in error with the National Surety Company as surety; that no certificate of evidence was presented; that plaintiff in error desired to abandon the prosecution of her appeal or any writ of error from the decree and had determined to allow the decree to become final and binding upon the parties. The agreement provided that in consideration of saving plaintiff in error the expense of perfecting her appeal or taking the case to this court, and having the appeal dismissed for the purpose of releasing all obligation on the appeal bond; and for the further purpose of enabling plaintiff in error to receive from the National Surety Company the money which she had deposited with it as an inducement to the surety company to sign the bond; and in further consideration of her abandoning her right to prosecute an appeal or writ of error to reverse the decree, defendant in error released all interest in the appeal bond.

Plaintiff in error contends that this agreement was without consideration, and therefore ineffectual to prevent her from seeking to reverse the decree by writ of error. By virtue of the execution of this agreement plaintiff in error received back from the National Surety Company the money she had deposited with it. This was certainly some consideration

moving to her. On the other hand the defendant in error released any claim he might have for court costs, which the bond was given to secure. It is therefore apparent that plaintiff in error's contention that the agreement was without consideration cannot be maintained. Plaintiff in error, however, further contends that the appeal bond was simply a cost bond for the benefit of the people and could not accrue to the defendant in error; that the order allowing the appeal was upon condition that plaintiff in error file a bond "for costs" and that this means costs which would accrue to the sheriff and other officers. This, of course, is a misapprehension. The bond in express terms runs to the defendant in error, and while the plea designated it a bond for costs, this is the common term used every day in our trial courts where only a nominal bond is required to cover the costs of the party defending the appeal. Manifestly, nobody but plaintiff in error could ever maintain a suit on the bond.

It is also contended that this being a suit for divorce no costs could be taxed against the plaintiff in error, for the reason that in a divorce proceeding a wife can obtain an order on the husband for the payment of costs and alimony. Since the passage of the "Married Woman's Act" there is no reason why costs should not be awarded against her in this court. Musgrave v. Musgrave, 54 Ill. 187.

Furthermore, the plea sets up that after the entry of the decree, defendant in error paid to plaintiff in error a

waiting to be. On this other hand the determinist is going one
lesson and claim to might been for many years, which the
land has given to answer. It is therefore evident that
plausibility in order's questions that his opponent was alle-
ged circumstances cannot be substituted. Possibility in order,
however, further contends that the ground been was simply
a case based the non reality of the people and would not
appear to the determinist in order; that the voice thinking
the ground not upon conditions that plausibility in order this
a land "his order" and that this order needs which would
matter in the reality and other efficacy. This, at course,
is a misunderstanding. The word in question tends back to the
determinist in order, and which the plan contingent in a land
the media, which the manner time has really dig in the
total circle about only a mental head in relation it order
the media at the really determining the ground. Indifferently,
namely his plausibility in order model arse motivate a mail on
the road.

It is also noticeable that this model a mail the
diversity of media would be based against the plausibility in order.
For the reason that is a diverse provoking a mail not which
an order on the business for the opinion or order not although
Since the passage of the "Existing Remedies" act, it is no
longer mail which should not be treated against the in this
court. Cheshire & Butterworth, op cit. 127.

Practically, the plan made in line after the order
of the course, considering the media land in plausibility in order a

number of the installments of the alimony, aggregating $931, and that the same was accepted by her. We think it clear that under these circumstances plaintiff in error cannot seek to have the decree reversed. Where a party accepts benefits of a decree he cannot afterwards prosecute error to reverse it. It operates as an estoppel and may be treated as a release of errors. Corwin v. Shoup, 76 Ill. 246.

It follows from what we have said that the demurrer to the replication must be sustained, and the writ of error dismissed.

WRIT OF ERROR DISMISSED.

538a

370 - 18693

PETER M. HOFFMAN, for use of CHICAGO GRAVEL CO., Plaintiff in Error, vs. JENNIE S. PARADIS & BANKERS' SURETY COMPANY, a Corporation, Defendants in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 643

MR. JUSTICE TAYLOR delivered the opinion of the court.

A judgment having been obtained by the Chicago Gravel Company on November 10, 1904, against Frederick E. Paradis, an execution was issued and certain personal property taken thereunder from the house where Frederick E. Paradis and his wife, the defendant, Jennie S. Paradis, lived as husband and wife. Claiming that the personal property belonged to her she replevied the property and in doing so she executed, together with the other defendant, Bankers' Surety Company, a replevin bond in the penal sum of $1200.00. One of the conditions of the bond was that, if she should prosecute her suit to effect and pay all costs and damages, it would then be void. Subsequently, on October 11, 1909, on motion of the defendant, the replevin suit was dismissed for want of prosecution, and a writ of <u>retorno habendo</u> ordered issued for the return of the property replevied.

On June 27, 1911, the plaintiff brought suit in the Municipal court upon the replevin bond, alleging in its statement of claim that the defendant, Jennie S. Paradis,

had failed to prosecute her replevin suit to effect or to make return of the property, and claiming as damages $600.00 as the value of the property, $194.75 interest, $3.00 costs and $175.00 attorney's fees, making in all $972.75.

On August 1, 1911 the defendant, Jennie S. Paradis, filed an affidavit of merits and on January 8, 1912, an amended affidavit of merits. She therein sets up as a defense that prior to and at the time of the levy of the execution issued on the judgment against her husband, and at the time the replevin suit was commenced, the personal property taken under the replevin writ belonged to her, and that she "was the sole and exclusive owner" thereof and was in her "sole and exclusive possession" and, therefore, wrongfully taken from her possession; and that in the replevin suit the merits of the case and the question of the title to the property were not determined.

The cause was tried before a jury and they brought in a verdict finding the amount of the debt to be $1200.00, and assessing the plaintiff's damages at $30.00. Judgment was entered thereon.

The chief question in the case is whether, at the time the execution was levied, the defendant, Jennie S. Paradis, possessed, and was the owner of, the personal property taken under the execution and set forth <u>in extenso</u> in the replevin bond. The property, the ownership and title to which was in controversy, is as follows:

> One Kimball piano, stool and coverlet, one rug, one settee, four parlor chairs, one rocker, five pictures, two vases, one mantel clock, one flower holder, four lace curtains, one jardinere, one fire log and

stand, one hall tree, one couch, one book case, one hundred and fifty books, one parlor lamp, one Morris chair, six pictures, one center table, two rockers, one rug, seven fancy pillows, three pieces bric-a-brac, one pair tapestry curtains, one couch, one dresser, one rocker, three rockers, eight pictures, one center table, one chiffonier, one iron bed and bedding, one ladies writing desk, four pair lace curtains, one white iron bed and bedding, one oak dresser, one oak chiffonier, one sewing machine, one upholstered chair, one rug, two pictures, hall and stair carpets, one white enameled bed and bedding, one upholstered chair, one oak dresser, one oak wash stand, one small rug, bed-room carpets, eight pictures, vestibule corner chair, one chair, one rug, two spear ornaments, one hundred and fifty pieces crockery, fifty pieces glassware, two dozen knives and forks, one dozen spoons, oak sideboard, one weathered oak combination sideboard, one dining room table, six dining room chairs, two small rugs, one lot table linen, four portiers, and three couch covers.

The judgment against her husband, Frederick H. Paradis, upon which the execution was issued was based on two promissory notes, one dated December 17, 1903, for $500.00, payable six months after date, the other dated December 29, 1913, for $500.00, payable on demand.

The defendant, Jennie S. Paradis, was the only witness called to testify as to the description, possession and ownership of the personal property. Her testimony is to the effect that she and Frederick H. Paradis were married at Burlington, Vt. in 1890, and came to Chicago to live in 1892; that shortly after coming to Chicago certain personal property, consisting of bedding, table linen, rugs, pictures, bric-a-brac, silverware, knives, forks and spoons, etc., was sent to her as property given to her and coming from her father's estate; that in the same year she received $500.00 in money from her father's estate; that she used about $400.00 of that money to buy furniture and that then she and her husband went to house-

[illegible]

The [illegible] Factory [illegible], [illegible] 1.

[illegible]

The Internal Debate 1. [illegible]

[illegible]

keeping in Austin, where she took all her other furniture; that at that time her husband was chief engineer of the Chicago Terminal Railroad, earning a salary of about $5,000.00 a year; that, every month, her husband gave her different sums to pay the household expenses; that he gave her certain sums of money with which she bought furniture, paid household expenses and bought anything she thought they needed; that of the furniture in the house, some of it came from her home in the East and some she bought and paid for out of the money that her husband gave her; that the last articles she bought that went into the house were obtained in 1900; that all that she purchased was obtained between 1892 and 1900; that her husband purchased no part of the property; that she "bought all of the furniture" and "paid for it"; that at one time, her husband, in addition to earning $5,000.00 a year, had a foundry business which lasted for about two years, up to 1903, when the foundry burned down; that while he conducted the foundry business she used to get from him $150.00 and sometimes $200 a month, and prior to that time he had been in the habit of giving her $100.00 a month; that she paid for household expenses, according to her best recollection, $50.00 a month; that from the time she commenced keeping house up to 1900, she received sometime $100.00 and sometime $125.00 a month from her husband; that she "had different sums of money every month, either more or less" in excess of what she was paying for household expenses; that all the household furniture and furnishings that were in the house are set forth in the affidavit of replevin and the replevin writ; that since the replevin suit was begun she and her husband have separated.

Evidence was offered on behalf of the plaintiff to the effect that the legal services rendered in the replevin suit were reasonably worth from $150.00 to $200.00; that two days time was spent in the preparation of the case for trial; that three pleas were filed and that it was reasonably worth $25.00 to prepare the pleas that were filed; that the replevin suit was dismissed without trial.

As stated by counsel for the plaintiff, the introduction in evidence of the replevin bond, the replevin writ and the affidavit of replevin and evidence that the replevin suit was dismissed for want of prosecution, and a writ of retorno habendo awarded and issued made out a prima facie case entitling him to recover the value of the property. Kellogg v. Hoyden, 126 Ill. 378. The question now arises, was that prima facie case overcome. We are of the opinion that it was. Hilkman v. Arthe, 223 Fed. 507. The record shows that there was presented to the jury on behalf of the plaintiff, the affidavit of the defendant in which she stated, under oath, that she was the owner of, and entitled to possession of all the property in question; the uncontradicted testimony of the defendant herself that the source of all her property was, first, the gift of part from her father's estate; second, part purchased by $400.00, which money she received from her father's estate; and third, part purchased by money given to her by her husband. As to personal property received from her father's estate and bought with money from her father's estate, the evidence justifies no controversy. It shows that it was in her possession and was hers absolutely. Counsel for the plaintiff claim, however,

that as to the part purchased with money given to her by her husband, it is not sufficiently shown that the money used in making such purchases was an out and out gift to her. There is nothing going to show, however, that at the time the furniture was bought her husband was indebted to anyone. At that time he was in receipt of a very fair income for a family of two. Although the plaintiff made out a prima facie case before the defendant testified, when, however, she took the stand and, without contradiction, testified that the property became hers by reason of a gift of part from her father, and the purchase of part with money received from her father, and a part purchased with money given to her by her husband, she overcame the plaintiff's case and at least, was entitled to have the evidence go to the jury. That was done and they found for her, and we are not now justified, with the evidence before us as it is presented in the record, in undoing their verdict. There was not only evidence tending to prove that she was sole owner and possessed of all the property, but we think as long as no part of her evidence was contradicted, it was obviously enough to prove both her ownership and possession. Counsel for the plaintiff has discussed the evidence quite elaborately, but as long as there is sufficient evidence to preclude us from concluding that the verdict is manifestly against the weight of the evidence, we must allow it to stand. What her testimony meant when she stated she received money from her husband that she bought and paid for furniture out of money her husband gave her, was for the jury to consider, along with all the other evidence. There is some discussion in the briefs in regard to the effect of the introduction in evidence by the plain-

tiff of the affidavit in replevin which had been executed by the defendant. But, as the plaintiff introduced it without qualification, the defendant was entitled to have all its contents considered, no matter in what way they might bear upon the issues involved; one of which was the ownership of the property. Slinghoff v. Bruner, 174 Ill. 561. Wigmore on Evidence, vol. 3 p. 2842; Pardon v. Dwine, 23 Ill. 523.

As to the evidence concerning attorney's fees; the jury were justified in determining from the evidence that was offered, what they were worth; they were not bound to accept the opinion of the witness Hoag; they were entitled to use their own judgment. Haish v. Sunday, 12 Ill. App. 539.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

[illegible]

[illegible]

[illegible]

[illegible]

378 - 24305

JAMES J. HARTY,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY, et al,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

214 I.A. 643

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action on the case brought by the plaintiff, James J. Harty, against the defendants for personal injuries resutling from falling off, or being thrown off, one of the defendant's cars. A verdict and judgment in the sum of $2,000.00 was recovered by the plaintiff. This appeal is taken therefrom.

The declaration consists of three counts. The first count charges that on June 16, 1914, the plaintiff while a passenger on a southbound car and in the exercise of due care and caution for his personal safety and while upon the rear platform in the act of entering the body of the car, defendant "so carelessly, negligently and wrongfully moved, operated, jerked and swayed said car as to cause the plaintiff at a point a short distance, towit; one block south of the intersection of Archer avenue with said Kedzie avenue, to fallfrom the same then and there and thereby greatly and permanently injuring him." The second count charges that defendants negligently operated the car upon which the plaintiff was riding "while the rails

upon which the said car was being operated, as aforesaid, were in a weak, insecure, unsafe and dangerous condition, and so that said tracks were out of alignment and so that said joints of the said rails were weak and loose and otherwise in a defective and dangerous condition." The third count is to the same effect as the second.

The accident occurred about twenty minutes past one in the morning on June 16, 1914. The plaintiff boarded the car at Archer avenue and Kedzie to go south to Chicago Lawn. On the evening of June 15, 1914, he visited one Anna Clancy at 3209 South Ashland avenue. He left her house between midnight and half past twelve. He walked to Archer and Ashland avenue and boarded a car that ran southwest on Archer avenue to Kedzie. When the car reached Kedzie, he got off and waited for a southbound Kedzie car. After waiting ten or fifteen minutes he boarded a car on the northwest corner of Archer and Kedzie avenue. It was a large electric car, and no one else, but himself, got on at that place and time. He gave his transfer to the conductor, who was standing on the back platform of the car. The car started south and shortly afterwards the plaintiff fell or was thrown off the car.

The car was of the pay as you enter type, about 50 feet long. The west side of the rear platform was open and furnished an exit from, and entrance to the platform. There was an iron rod at the outside edge of the platform half way between the rear end of the body of the car and the part which divided the platform from the body of the car; it extended from the platform or floor to the roof of the car. A horizontal iron railing extended east from

the upright rod and curved around to the body of the car. That fact, however, is disputed by the plaintiff. The railing, however, when in position, separated the exit door from the entrance door and divided the platform into two parts. The conductor stood in the space enclosed by the curved rail and was near the exit door of the car. There were but four persons on the car; the plaintiff; Conductor Quirk; the motorman, Remkenke; and a passenger, Crouch. After the plaintiff fell from the car and was injured, he was picked up and put on the car and taken to 63rd street and then to a doctor's office. For some time after he was picked up, he seemed to be unconscious, but was able to give the doctor his name. From the doctor's office he was put into an ambulance and taken to St. Bernard's Hospital. The chief injury which he suffered was a fractured pelvis. In addition to that, however, his head and one of his shoulders were injured. In order to care for the fractured pelvis, it was put in a cast; that remained on the full time he was in the hospital which was between five and six weeks. For three or four weeks after leaving the hospital he was on crutches and after that walked with a cane for four or five weeks. At the time of the accident he was earning $6.00 a day working for an advertising company; prior to that time he had worked for more than twelve years for the Cusack people. He was a practical sign painter. After the accident he did not start to work until the early part of March, 1915. He then started to sell cigars and tobacco, and then in June, 1915, he went into the advertising sign painting business and kept a paint store by himself.

It is the theory of the plaintiff that after standing on the platform for a short time and after starting to walk in through the rear door, that is the exit from the rear platform, and just as he was about to step into the enclosed part of the car, the car lurched with an unusual sway and he was thrown off.

It is the theory of the defendants that the evidence establishes that the plaintiff was not caused to fall from the car by a negligent jerk or swaying of the car; that the car was not negligently operated over rails and tracks that were defective, but that the plaintiff fell from the car and was injured while intoxicated.

The evidence of the plaintiff is to the effect that after boarding the car he stayed on the rear platform a short time, smoking; that he then started to go into the rear body of the car and walk in through the rear door, that is the exit from the rear platform; that just as he was about to step into the car, "it gave a lurch and unusual sway" and he was thrown off; that at that time the conductor was in the body of the car where he had gone just after taking plaintiff's transfer; that when he got on the platform the railing that protects the motorman, around the controller, had not been changed over; that he leaned up against it; that when the car gave a lurch he fell right off on his right side; that it happened a couple of blocks south of Archer avenue on Kedzie; that he was familiar with the track in that neighborhood, having traveled over it for some time; that he had observed the rails on the Kedzie avenue tracks before his accident; that they were "sort of wavey, no alignment there"; that there were places

where the joints were open from a quarter of an inch to an inch; that there was a looseness in the joints; that "in crossing over them the car would bound up and down" and sway; that "the action of the street cars in going over the rails was something of that nature, up and down, swaying and then also sideways"; that the car swayed from side to side "to the extent at various times that you would be jostled and pushed from one side to the other"; that the handstraps would sway so much that they would hit the ceiling.

On the subject of intoxication the evidence of the plaintiff is to the effect that he did not drink anything intoxicating on the night of the accident; that he had taken the pledge about Christmas or New Years and that from that time up to the time of the accident he had drunk some beer once in a while. When asked if the reason he took the pledge was because he was a drinking man he said "no not exactly that."

The evidence of the witness Anna Clancy, whom Marty visited the night prior to the accident, is to the effect that she was with him from 8:30 until twenty or thirty minutes past twelve; that she lived at 32nd and Ashlandavenue; that during the time she was with him on the night of the accident he did not have anything intoxicating to drink in her company; that there was nothing about him to indicate to her that he had been drinking or was intoxicated when he came to her house that night. On the subject of the running of the Kedzie avenue street cars she testified that she traveled over them about every two weeks; that she did'nt pay any attention to the rails but she noticed in particular the jar of the car from one side to the other. Further, she testified, "I know if you did not have hold of the strap or seat you sure would

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fall down." The evidence of one Murray was that the rails were not in alignment and that the action of the cars" was shaky."

The only occurrence witness called by the plaintiff was himself. On behalf of the defendants three occurrence witnesses were called; the motorman, the conductor and the passenger, Crouch. The evidence of the latter, who at the time of the trial was a public accountant, is to the effect that on the night in question he got on the car at 26th and Kedzie; that he sat on the east side of the car "right at the door" on the seat that runs lengthwise with the car facing the aisle of the car; that he could see out on the platform from where he sat; that there were no other passengers on the car; that he saw the plaintiff get on at Archer avenue and hand a transfer to the conductor; that the plaintiff stood on the back platform; that there was a railing on the platform around the conductor; that the plaintiff was on the opposite side of the railing from the conductor; that the conductor was inside the railing next to the body of the car; that he, the witness, could see his face; that he stood there while the car went from one to two blocks; that the car was going at a normal rate of speed; that "he appeared to me to be intoxicated;" that after the car had gone about a block "he suddenly fell over backwards out of the car into the street"; that there did not appear to be anything unusual in the running of the car; that he did not notice any unusual"lurch, or jerk, or bump or anything of the kind." On cross examination he states that the first thing about him that made him think the plaintiff was

intoxicated was the peculiar look of his face and eyes; that "he appeared intoxicated"; that "he seemed to be standing there on the rear platform in a rather bemuddled state"; that he did not stagger; that the car was not going from one side to the other nor up and down particularly; that "it proceeded at an ordinary rate, forward was the only motion" going about 8 to 10 miles an hour.

The evidence of Quirk, the conductor, is to the effect that the rail on the back end of the car was in its proper position and divided the entrance door from the exit door; that he, himself, was south of the horizontal bar and was facing north; that the plaintiff after he got on stood there on the other side of the horizontal bar facing south; that there was but one other passenger on the car; that the track was perfectly straight and was all right there; that nothing was wrong with it; that the car did not wobble around from one side to the other; that it was going about 8 miles an hour; that when the plaintiff got on the car at Archer avenue "he looked to me like that he had been drinking, under the influence of liquor, just so I know he was drinking. I know the man was drinking"; that about 500 feet from Archer avenue he keeled over and fell right off into the street; that he didn't stagger; that when he fell off he, the conductor, was on the back platform facing him, looking right at him; that "he just flopped right over and fell out"; that the car was going along between 7 and 8 miles an hour in a regular way; that as soon as he fell off he gave the emergency bell and the car stopped; that the rails were smooth all the way out from 22nd to 63rd street.

The evidence of the motorman, Romkoske, is to the effect that the accident happened about 1:33 A. M.; the weather was good; that the last stop was north of Archer avenue; that his run was from 22nd to 63rd street; that at the time of the accident he was going about 8 miles an hour; that "the car was not wobbling around from side to side but going straight on when he got the emergency bell;" that there was one passenger on the car besides the plaintiff; that he and the conductor took the plaintiff to the doctor's office across the street on 63rd street west of Kedzie; that they were in the doctor's office with him about twenty minutes; that he saw him on Archer before he took the car; that before he got on the car "he looked to me though like if he had some liquor in him"; that when he stopped the car at Archer and Kedzie to let him get on, he, the plaintiff, "was not standing like a man that was perfectly sober"; that "he was standing though like if he had some drink in him", was staggering a little bit; "he was not just exactly staggering, falling, but he walked and looked though like if he was under the influence of some liquor"; that when he helped carry him up to the doctor's office he noticed the odor of liquor about him.

The evidence of Victorson, foreman for the street car company, is to the effect that the tracks in Kedzie avenue from Archer avenue south to 63rd street had been put in in 1910, after a sewer had been constructed in that street; that after the sewer was laid they put in crushed stone to a thickness of about 8 inches and then an inch of limestone screening and then rolled it with a steam roller; that oak ties about two feet apart were laid on top of the

crushed stone and then tamped in; that between the ties it was filled up with crushed stone to a level of the top of the rail and rolled in with a steam roller; that on top of the ties were laid 7 inch flanged rails 85 lbs. to the yard; that they were fastened to the ties with a brace; that the surface of the crushed stone and the fine stone was brought about level with the top of the rail; that that was done between the tracks and extended about 18 inches outside of the track on each side; that the tracks from Archer avenue to 63rd street were straight; that "there was no wobbling from side to side on these tracks, there couldn't be." The jury brought in a verdict in the sum of $2,000.00 in favor of the plaintiff and upon that judgment was duly entered. This appeal is taken therefrom.

A careful consideration of the evidence suggests at once that the plaintiff has not shown that he exercised such care as the situation he was in, on the platform of the car, required. Nath v. C. C. Ry. Co., 243 Ill. 114. It was not negligence to stand on the platform or to start from the platform to go into the car through the entrance door. It is the theory of the plaintiff, however, that the oscillation of the car threw him into the street or caused him to fall. The evidence of the plaintiff as to the condition of the tracks and the oscillation of the car, slightly corroborated by witnesses Clancy and Murray, is much more than set off by the evidence of Crouch, the passenger, Victorsen, the foreman, and that of the motorman and conductor. Victorsen said that the tracks were straight; that there was no "wobbling"; and Crouch, that the running and moving of the car was normal.

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As to the condition of the plaintiff at the time he was on the platform, Crouch, the passenger, and the conductor, both of whom were near the plaintiff at the time he fell, and the motorman who saw him on the street before he got on the car, all say he appeared to be intoxicated and the only denial is that of the plaintiff himself. Miss Clancy had not seen him after 12:20 or 12:30 and he did not board the car until about an hour afterwards. She states that while he was with her he did not drink anything intoxicating and the testimony of the doctor who treated him after he was injured was, on the subject of intoxication, negative, so that the practical result, on the subject of intoxication, is that three of the witnesses state that he appeared to be intoxicated, but he, himself, denies it. Grimm v. Clark Delivery Co., 199 Ill. 553; Dick v. Swanson, 139 Ill. App. 168.

As bearing on the credibility of the plaintiff it is significant that the testimony of the plaintiff, that the railing had been left around the controller unchanged, was flatly denied by Crouch and the conductor and is, also, opposed to the normal elements of probability. If knowing - and he testifies he knew - that the car was very likely to sway and lurch, he started to walk away from the iron railg which he testified was back of him, towards and through the right hand exit door to enter the car, there being an entrance door to the left and enclosed side of the car, he did not exercise ordinary care. Ordinary care, when standing on a platform, may mean much more acute observation and much more physical control and conduct than it does when one is comfortably seated within. Howes v. C. S. S. L. R. R. Co., 217 Ill. 500. "The attention and circumstances to avoid injury required of both

As to the possession of the plaintiff in the case
in hand the plaintiff, Counsel, has contended, and the trial
Court, held, that at times when the plaintiff is the right
the field, and the defendants did not make use of the disputed portion
he put his own land, all the time he cultivated in the ordinary manner
with the land. In fact, the defendants did not make use of the land
which was under dispute in the year of the plaintiff. Hence
there was not the slight evidence to show that the plaintiff was
dispossessed. The trial Court rightly held that the plaintiff had
proved his possession of the disputed land. Counsel for the
defendants has, on the evidence of Lakshmanan, argued, in the
alternative, that the plaintiff's possession was not exclusive, but
was shared with the defendants. Counsel, in support of this
contention, has cited the authority of Lakshmanan, for the
proposition that the plaintiff's claim can be established to be exclusive,
that he, himself, should be in possession of the property. See
Pal. 1941 Mad. 6 at Thomson, AIR 1941. Pat. 146.

As regards the question of the possession of the plaintiff is
in dispute, that the evidence of the witnesses, that the
plaintiff should be in possession of the property. See the
Pal. 1941 Mad. 6 at Thomson, AIR 1941. Pat. 146.

As regards the question of the possession of the plaintiff is
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As regards the question of the possession of the plaintiff is
in dispute, that the evidence of the witnesses, that the
plaintiff should be in possession of the property. See the
Pal. 1941 Mad. 6 at Thomson, AIR 1941. Pat. 146.

parties is to be measured by the situation of the passenger and danger connected therewith." Nath v. C. S. Ry. Co., (supra).

Taking all of the evidence together, analyzing and considering it, we are unable to find sufficient to justify the verdict of the jury. It does not sufficiently show ordinary care on the part of the plaintiff nor negligence on the part of the defendant. We are, therefore, of the opinion that the plaintiff clearly failed to make out his case by a preponderance of the evidence and that the verdict of the jury was manifestly against the weight of the evidence.

The judgment is therefore reversed with a finding of fact.

REVERSED
WITH A FINDING OF FACT.

FINDING OF FACT: That the plaintiff was guilty of negligence which directly contributed to his injury and that the defendant was not guilty of negligence which was the proximate cause of such injury.

393 - 24331

JOHN PAULS,

Appellee,

vs.

KEASBEY & MATTISON COMPANY,
a corporation,

Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 643

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action on the case, for personal injuries, against the defendants, Keasbey and Mattison Company, and the Illinois Moulding Company. The latter was non-suited, and a trial was had before a jury and a verdict rendered against the former in the sum of $5,000.00. Judgment was entered thereon and this appeal taken.

The plaintiff was employed as a workman by the defendant, Keasbey and Mattison Company, to cover with asbestos a certain boiler which constituted part of a power plant owned by one Mollner. The work consisted of covering the boiler with strips or blocks of asbestos material and then covering the asbestos with canvas. He was sent, by the defendant, with two other men, Mahoney and McGarvey. Mahoney had charge of the job and instructed the other two men as to their duties. All three commenced their work on Friday, May 21, 1909. The boiler had steam up, carrying 125 lbs. pressure and was equipped, on top and near the front, with what is known as a steam safety valve.

At intervals, during all the time the plaintiff worked there, the steam safety valve kept letting off steam to take off the overload from the boiler. On top, towards the rear end, and about a foot behind the manhole in the boiler, there was a device known as a Hills-McKenna water alarm or water safety valve; its purpose being to give an alarm in case of low water. It consisted of a steel pipe - one half to three quarters of an inch in diameter and from one and one half to two feet long - which was screwed at its lower end into a bushing in the shell of the boiler, and extending upwards perpendicular to and outside of the boiler; and a similar piece of pipe screwed into the same bushing on the inside of the boiler and extending down so that its lower end would be normally below the level of the water. It was so constructed that when the water in the boiler was lower than the bottom of the pipe steam would rush in and a certain metal plug - fusible at a low temperature - in the steel pipe would melt and allow the steam to escape and, thus, warn the engineer. When the plaintiff, Mahoney, and McGarvey began work they noticed that this pipe was bent, at the bushing near the shell of the boiler, about 22½ to 30 degrees from the perpendicular, but showed no leak at the joint. On the Monday following about 3:00 P.M., May 24, 1909, while the plaintiff, down on his hands and knees, was working close to and back of the pipe on top of the boiler, placing a canvas covering, there was an explosion and the pipe blew out, steam and water following, knocking the plaintiff off the boiler and down on to the cement floor, causing him severe injuries. He was struck by the pipe and scalded by the

hot steam. He testified that he was in bed in the hospital seven weeks and a half; that he had a cast on his right leg for about ten weeks; that his principal injury consisted of a compound fracture of the right ankle; that he had to use crutches for about nine months; that the injured leg is shorter than the other leg and that use of the right foot is seriously and permanently impaired. Defendant continued plaintiff's wages and paid him $20.00 each week for a period of 53 weeks. Near the end of that period, the defendant promised to give him light work if he would return to its employ; this offer the plaintiff refused to accept unless he was given a guarantee of permanent employment or until he was able to go to work elsewhere. The plaintiff gave receipts for the 53 payments and they were offered in evidence. He talked with Mr. Coutts, the superintendent, and Mr. Nichols, representing the defendant, in regard to a settlement of his claim, but there is nothing in the record showing that any definite agreement was actually consummated.

Two consulting engineers, Woodworth and Taylor, were called as expert witnesses and testified concerning the effect of the bending of the pipe on its efficiency and ability to withstand strain. Woodworth testified that the bending of the pipe would affect it as a protective measure to the security of the boiler and Taylor testified that he could not see how the bending would reduce the tensile strength, and that, in his opinion, if after being bent from a third to a quarter of an inch from the perpendicular it showed no signs of leakage, it would withstand 125 lbs. pressure. The evidence does not show whether the pipe, at the point where it broke, had become weakened by

rust or had deteriorated from crystalization, or what was its physical condition at that time.

It is contended by the defendant that it did not at any time have charge of the boilers in question nor have anything to do with their management and is therefore not liable. Having contracted, however, to do the work upon the boiler in question, and having sent Mahoney, McGarvey and the plaintiff to do that work, it follows that if the plaintiff exercised ordinary care and the defendant was guilty of negligence, it was liable. The first question in the case is whether, inasmuch as the plaintiff knew at the time he went to work that the pipe on the outside of the boiler, constituting a part of the water safety device, was bent, the plaintiff assumed the risk. Considering the facts in the case, the most pertinent decision of the Supreme court is that of Libby, McNeill & Libby v. Cook, 222 Ill. 206. In that case, an oiler, who was employed in an engine room was injured by the breaking of a metal strap which fastened the connecting rod to the piston rod of an engine. A day or two prior to the accident the oiler called the attention of his foreman to the fact that there was an opening between the strap and the rod and asked him if the strap was not sprung and if it would not be safer if a bolt were put through the strap and rod to hold them together, to which the foreman replied that the strap or rod was worn but "that it was all right." The evidence also showed upon inspection after the accident that the strap was partly broken through from the inside prior to the time of the accident. In the course of the opinion Mr. Justice Scott said:

[illegible] [illegible] [illegible] [

"Appellant and appellee both knew of the outward defect. Neither had actual knowledge of the hidden danger. Appellant had the right, and the evidence tends to show that it was its duty, to make an examination to determine whether such a danger existed. Appellee had no such right, and while he had knowledge of the defect it does not appear that he had knowledge of the danger, and under such circumstances it cannot be said that he assumed the risk." Citing, Consolidated Coal Co. v. Maenni, 146 Ill. 614; Illinois Steel Co. v. Schymanowski, 162 id. 447; Union Show Case Co. v. Blindauer, 175 id. 325; Chicago and Eastern Illinois Railroad Co. v. Knapp, 176 id. 127; Swift & Co. v. O'Neill, 187 id. 337; Chicago and Eastern Illinois Railroad Co. v. Mesrey, 203 id. 492. In the instant case the plaintiff and the defendant, the latter through constructive notice, knew that the pipe was bent from 22½ to 30 degrees from the perpendicular and both therefore knew that to that extent it was defective. Upon the trial two expert witnesses were called and they gave it as their opinion that the bending of the pipe to the extent mentioned would only slightly weaken it. Obviously the plaintiff, and it may be said also the defendant, as said in Libby, McNeill & Libby v. Cook, supra, "both knew of the outward defect", but "neither had actual knowledge of the hidden danger." Then too, as further said in the latter case, "appellant had the right, and the evidence tends to show that it was its duty, to make an examination to determine whether such a danger existed. Appellee had no such right and while he had knowledge of the defect it does not appear that he had knowledge of the danger and under

such circumstances it cannot be said that he assumed the risk." In E. J. & E. Ry. Co. v. Myers, 226 Ill. 358, the court assumed that the plaintiff not only knew of the defect but also of the danger.

The second question pertains to the duty of the defendant. The law requires an employer to exercise reasonable care in providing a reasonably safe place for his employee to work. Bailey, Personal Injuries, Vol. 1, Sec. 93; McBeath v. Hawle, 192 Ill. 626. In Shillinger Bros. Co. v. Smith, 225 Ill. 74, Mr. Justice Cartwright said: "Among the personal duties of the master is the duty to use reasonable care to furnish the servant with a reasonably safe place in which to work." Ide v. Fratcher, 194 Ill. 552. That, of course, does not mean that the employer is bound to guarantee that the place is entirely safe. The employer is not required to be omniscient nor to take on the extensive obligations of an insurer; his obligation is to exercise reasonable care. Any greater obligation would endanger employment, unnecessarily handicap employers and deter construction and manufacture. Further, the rule seems to be that the employer is only bound to use reasonable care to protect an employee against danger which is not within the latter's knowledge or observation. Of course, what constituted reasonable care on the part of the employer, depends upon the circumstances of the case. Sometimes it involves actual, close inspection. In Marsh v. Chickering, 101 N. Y. 396, referring to the rule, in such a case the following language is used: "It is one of a just and salutary character, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor which only requires

the use of implements with which they are entirely familiar." In Kinney v. Corbin, 132 Pa. St. 341, it is stated that the rule is different where the machinery requires regular inspection and is ordinarily presumed to demand repairs and attention. In other words, it is not necessarily the duty of the employer to inspect simple devices. The reason being that the law assumes that the mind of the average employee has sufficient knowledge and comprehension to understand them and their defects, if any. William v. Garbutt Lmbr. Co., 132 Ga. 221; Murphy v. O'Neil, 204 Mass. 42. In Illinois Steel Co. v. John Mann, 100 Ill. App. 367, the following language is used: "A servant must take notice of obvious material conditions and of obvious danger, but he is not obliged to look for these; while the master must ascertain material conditions and danger which can be found by the exercise of reasonable diligence. The burden is upon the master to furnish reasonably safe machinery, appliances and surroundings; and the servant may rely upon the discharge by the master of his duty in this respect. * * * In other words, the master has a duty of inspection as well as observation; the obligation of the servant is that of observation."

In the instant case, the place where the plaintiff worked - helping to put an asbestos covering on a boiler which was in actual use with 125 lbs.,or more, of steam on - was normally fraught with some, though not especially obvious, danger. Of course every part of the boiler was under high pressure and if anything about it gave way the result would probably be disastrous to some or all who were working about it. It was not a new boiler. The fact that the pop-off at somewhat frequent intervals let off steam was evidence

that that device was working and that the pressure was being kept at a proper degree and within the supposed scope of the boiler. The record clearly shows that the plaintiff and Mahoney, the defendant's representative, were familiar with the bent condition of the safety device; they admitted they noticed it and spoke of it the first day they went to work. It does not appear, however, that either of them knew that there was any danger arising from its bent condition. Both had been employed for about five years on that kind of work and may be presumed to have had a general knowledge of the dangerous possibilities of a steam boiler with steam up at high pressure. Whether that knowledge and experience on the part of the plaintiff, coupled with his notice of the bent pipe, was sufficient to charge him with knowledge of actual danger and therefore with assumption of the risk was, rightly, a question for the jury. If at the time in question the bent pipe actually was defective-and the fact that the bent pipe broke may be said to be some evidence that it was defective - and the danger of being scalded by high pressure steam was very great, it follows that, judging the matter by normal standards, reasonable care on the part of the employer would require of him careful oversight and inspection in order that no defect reasonably significant of danger might be overlooked. The place was an awkward one and the boiler in some measure a dangerous instrument and it therefore became the duty of the employer in the exercise of reasonable care, considering all the circumstances, actually to inspect the water safety pipe. Illinois Steel Co. v. John Mann, supra; Devine v. Sproul, 177 Ill. App. 563;

Libby, McNeill & Libby v. Cook, 223 Ill. 246. If the weakness of the bent pipe, and therefore the danger, was not discoverable by a reasonable inspection and by consideration of the fact that the pipe was bent, of course negligence could not be chargeable to the employer; but the evidence shows that no inspection at all was made save that it was known that the pipe was bent. As said in Libby, McNeill & Libby v. Cook (supra) "the jury might reasonably conclude that had this course been pursued (that is an inspection made) the accident would have been prevented." The obligation upon the employer seems to be very rigorous and especially is that true in such a case as this, where, according to the testimony of the experts, the mere bending of the pipe would only slightly decrease its original efficiency and therefore would be very little evidence to the mind of the average employer, of specific danger. Although knowledge of the condition of the bent pipe, which suggested a defect, was equal on the part of both plaintiff and defendant and may have failed to give rise in the mind of either to any thought of danger, yet according to the reasoning in Libby, McNeill & Libby v. Cook, supra, as the defendant had the right, and as the evidence tended to show, it was its duty to make an examination of the water safety device to find out whether danger existed, it was liable for not having done so. The facts in the instant case are slightly different, in that, here, the defendant had employed the plaintiff and others to work upon a boiler which was the property of and upon the premises of a third person. We do not think, however, that that difference in any way affects the application of the legal principle.

Libby, McNeill & Libby v. Cook, 222 Ill. 266. If the weakness of the bent pipe, and therefore the danger, was not discoverable by a reasonable inspection and by consideration of the fact that the pipe was bent, of course negligence could not be chargeable to the employer; but the evidence shows that no inspection at all was made save that it was known that the pipe was bent. As said in Libby, McNeill & Libby v. Cook (supra) "the jury might reasonably conclude that had this course been pursued (that is an inspection made) the accident would have been prevented." The obligation upon the employer seems to be very rigorous and especially is that true in such a case as this, where, according to the testimony of the experts, the mere bending of the pipe would only slightly decrease its original efficiency and therefore would be very little evidence to the mind of the average employer, of specific danger. Although knowledge of the condition of the bent pipe, which suggested a defect, was equal on the part of both plaintiff and defendant and may have failed to give rise in the mind of either to any thought of danger, yet according to the reasoning in Libby, McNeill & Libby v. Cook, supra, as the defendant had the right, and as the evidence tended to show, it was its duty to make an examination of the water safety device to find out whether danger existed, it was liable for not having done so. The facts in the instant case are slightly different, in that, here, the defendant had employed the plaintiff and others to work upon a boiler which was the property of and upon the premises of a third person. We do not think, however, that that difference in any way affects the application of the legal principle.

Of course it is contended by the defendant that the plaintiffs injury was the result of a pure accident; that the mind of the average man, workman or employer, would not have considered the fact that the pipe was bent as any evidence of prospective danger; and there is considerable force in that argument. To hold the employer liable under such circumstances seems, at first blush, to make him an insurer of his employees safety, at least as to unexpected dangers which may arise without material forewarning. However, although the law does not describe in terms just what amount of evidence of danger is necessary to make the employer liable, it is probably owing to the fact that the circumstances of each case are generally unique and, therefore, should be presented to the jury for its determination. Applying, therefore, the principles above mentioned to the facts in the instant case it follows that it was proper that the question, whether the defendant used reasonable care in furnishing the plaintiff a safe place to work and the question, whether if he did not the danger was so obvious to the plaintiff that he must be considered to have voluntarily assumed the risk, should be submitted to the jury. Ide v. Fratcher, supra; Devine v. Sproul, supra. The record now shows that the jury upon the evidence and pursuant to instructions found by its verdict that the plaintiff exercised ordinary care and did not assume the risk and that the defendant failed in its duty and was guilty of negligence. Bearing in mind the evidence and the law we feel that the verdict of the jury must stand. Some question is made as to the amount of the verdict. At the

time of the injury the plaintiff was 26 years of age. He was in the hospital seven weeks and a half. He went home on crutches. At that time his foot was painful. It was in a cast for about nine weeks. Pus ran from the wound for nine months after the injury. There was a compound fracture. Prior to the injury both legs were of the same length. At the time of the trial the injured leg was half an inch shorter than the other; the calf of the injured leg was half an inch less in circumference than the other; the thigh and ankle were also smaller. There existed a deformity of the fibula. The motion of the right ankle was less than normal. There is a displacement of the lower ends of the tibia and fibula of about half an inch. The inside of the tibia, where it was broken off has not healed to the rest of the bone. There are two pieces of bone below the tibia that are not attached where they should be.

Having in mind what the evidence shows as to the extent of the plaintiff's injuries and their permanence, and there being no substantial testimony to the contrary, we are loath to disturb the verdict and to substitute our opinion for that of the jury; and being of the opinion that the evidence does not show that the damages are exorbitant or outrageous or that the jury must have acted from prejudice, partiality or corruption, we cannot consistently with the decisions of the courts interfere with the verdict. As to instruction number nine, given for the plaintiff, and number thirty, refused the defendant, we find no error in the action of the trial court. There was insufficient evidence to base

[illegible] the [illegible] [illegible] [illegible]

number thirty on, and number nine was entirely apt.

Finding no material error in the record the judgment is affirmed.

AFFIRMED.

66 - 24360

JAMES T. BURTON & ADA BURTON
Defendants in Error,

vs.

RALPH O. PROCTOR,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

214 I.A. 644

MR. JUSTICE TAYLOR delivered the opinion of the court.

On November 30, 1917, the plaintiffs, James T. Burton and Ada Burton obtained a judgment by confession against the defendants, Ralph O. Proctor and Marguerite Proctor, in the sum of $605.00 for rent. On February 8, 1919, it was ordered that the judgment be opened and leave given to the defendants to make their defense, and that the judgment stand as security and execution be stayed. On the same day the defendants filed an affidavit of merits. On February 18, 1918, by agreement of both parties it was ordered "that the following numbers (448123 - 448432 and 449016) of cases in the Municipal court entitled Burton v. Proctor be and they are hereby consolidated with this cause"; and leave was given the defendants to file an additional affidavit of merits instanter. On February 27, 1918, the defendants filed an additional affidavit of merits.

In the additional affidavit of merits it is stated that the plaintiffs have no cause of action because they "have received and retained the sum of $3,000.00

mentioned in said lease as compensation for any damage sustained by plaintiffs by reason of any breach of the lease by defendants and by reason thereof are barred from recovering any other or further sum of money from defendants or either of them by reason of any breach of the lease or any covenant thereof by them or either of them."

The written lease, upon which the four consolidated suits for rent were based, was dated October 1, 1912, and expired September 30, 1922. The suits were brought by the lessors, James T. Burton and Ada Burton, against the lessees, Ralph C. Proctor and Marguerite Proctor for certain monthly installments of rent. The premises were located at 3830-3832 Indiana avenue and were known as the Burton Theatre; the rent was $3,000.00 per annum, payable in installments of $250.00 each month.

The portions of the lease that are material for consideration here are as follows:

> All modifications, changes or amendments made to the ordinances by the City of Chicago, or to the Statutes of this State hereafter in any way affecting theatres or places where moving pictures are shown, during the term of this lease, shall be complied with by the lessee at his own expense, and is one of the covenants of this lease. Failure to comply with any of the ordinances or statutes for thirty (30) days shall be considered a default of this lease and shall be sufficient to terminate this lease, (and forfeit the money hereinafter mentioned, to-wit: Five Thousand Dollars ($5,000) to the lessor as liquidated damages and the lessee agrees in no wise to contest said forfeiture) and the said lessor shall be entitled to immediate possession.
>
> It is further agreed that at the termination of this lease, by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and failing so to do, to pay as liquidated damages, for the whole time such possession is withheld, the sum of five thousand dollars ($5,000) paid to first party upon the execution of this lease, but

the provisions of this clause shall not be held as a waiver by said first party of any right of re-entry as hereinafter set forth; nor shall the receipt of said rent or any part thereof, or any other act in apparent affirmance of the tenancy, operate as a waiver of the right in forfeit this lease and the term hereby granted for the period still unexpired, for any breach of any of the covenants herein.

Said lessee, or party of the second part, has paid Five Thousand Dollars ($5,000) cash bonus to the lessor upon the signing of this lease, the receipt of which is hereby acknowledged. Said money becomes the absolute property of the lessor in the event of the default of the lessee in the performance of any of the covenants herein provided by them to be made and performed, including the payment on the first of each and every month of the rent provided herein. It is specially agreed that default is to be effective and conclusive against said lessee upon non-payment of such stipulated rent on the first day of each and every month after the tenth (10th) day of any month.

In the event that there is no default by the lessee as herein covenanted during the first five (5) years of said term, Two Thousand Dollars ($2,000) of said sum of Five Thousand Dollars ($5,000) shall be applied on the last eight (8) months of the first five (5) year term herein demised as and for rent of said premises herein demised for said eight (8) months.

In the event that there is no default by the lessee as herein covenanted in the second five (5) years of the term herein demised, the Three Thousant Dollars ($3,000) of said Five Thousand Dollars ($5,000) remaining shall be accepted as and for and in lieu of rent for the last one (1) year of the term of this lease.

It is further agreed that the sum of Two Thousand Dollars ($2,000) herein mentioned shall draw interest at the rate of six per cent (6%) per annum until said money is either taken for rent for the last eight (8) months of the first five (5) year part of this lease on to-wit: January first, A. D. 1917, or default is made in any of the covenants of this lease and the term ended, in which event interest shall cease and all interest then due or accrued upon the total sum of Five Thousand Dollars($5000) shall immediately then and there become the property of the lessor as liquidated damages of the said lessors.

It is further agreed that the sum of Three Thousand Dollars ($3,000) herein mentioned shall draw interest at the rate of five per cent per annum until said money is either taken for rent for the last one (1) year of the last five (5) year part of this lease on to-wit: October first, A.D. 1921, or default is made in any of the covenants of this lease and the term ended, in which event interest shall cease, and all interest then due or accrued shall, together with the principal, of

Three Thousand Dollars ($3,000) become the property of the lessor.

It is further agreed that the yearly interest on the sum of Five Thousand Dollars ($5,000) aforesaid for the first five (5) year period of this lease, amounting to Two Hundred seventy ($270.00) Dollars per year shall be due and payable on September first, of each and every year during said five year period.

It is further agreed that the yearly interest on the sum of Three Thousand Dollars ($3,000) for the second five (5) year period of this lease, amounting to one hundred fifty ($150.00) Dollars per year, shall be due and payable on September first of each and every year during said second five (5) year period, except the last year thereof.

At the trial there was offered in evidence on behalf of the defendant a certain letter and check, and the testimony of the defendant, Ralph O. Proctor, and a witness, Loring. The defendant, Marguerite Proctor was dismissed out of the cause.

The evidence of Ralph O. Proctor is to the effect that he signed the lease; that he has not occupied the premises which were used as a motion picture theatre since October 30, 1917; that he made some arrangement with one Lederer as to opening the theatre; that Lederer opened up the theatre; that he helped him by lending him some money and giving him directions and arranging a program for him; that he discussed with him the cost of operating the theatre. A letter dated January 23, 1918, signed by Lederer and addressed to Leinen, attorney for the plaintiffs, which purports to be a statement of what Lederer expected to do with the theatre property, was offered in evidence. In the latter part of the letter are the words, "I feel I can make arrangements with Mr. Proctor to get a reasonably good percentage of the profits above the rent which I can add to my salary and that is what I will try to do." There is no evidence

whatever that any arrangement actually was made by the plaintiffs with Lederer. The evidence of the witness Loring is to the effect that he occupied the motion picture theatre at 3830 Indiana avenue, known as the Burton Theatre, from May 26, 1914, until the last of April, 1917; that he paid rent to J. T. Burton for the use of the theatre for the month of October, 1917. A check for $25.00, dated October 9, 1917, payable to the order of J. T. Burton, endorsed, balance due October rent, was offered in evidence. Loring further testified that he occupied the theatre until the end of October 1917; that on account of business conditions he was forced to vacate; that he sent the keys by registered mail to James T. Burton, one of the plaintiffs. ~~[illegible]~~

At the close of the evidence six propositions of law were submitted to the court; the first was held and the other five refused. On March 30, 1918, the court entered judgment against the defendant, Ralph G. Proctor, in favor of the plaintiffs in the sum of $1305.00 together with costs. The judgment included a balance of rent for September, 1917, all of the rent for the months of October, November and December, 1917; and the month of January 1918, together with certain attorney's fees.

It is the contention of the defendant that in case of a default in the payment of the rent, the parties to the lease have stipulated as to the damages, and the plaintiff "has no alternative but to accept and retain the $3,000 remaining in his hands as liquidated damages and as

a sole and only compensation for any damage he may have sustained by reason of the breach of covenant by Proctor to pay rent." We are of the opinion that the evidence and authorities do not sustain the defendant's contention. According to the evidence there was no re-entry by the landlord and the right of possession still remained in the tenant. Under the circumstances rent was still accruing. The lease does not provide that the defendant may vacate and then claim, ex parte, that the lease is at an end and that the landlord's right to rent has ceased. There is no such express provision in the writing; the plaintiffs have not sued for general damages for a breach of contract on the theory that the lease was terminated; they have merely sued for an installment of rent pursuant to the terms of the lease. The defendant claims that the plaintiff re-entered and took possession and also that the plaintiff put another tenant in possession; but the record contains, in our opinion, insufficient evidence to establish such claim.

In Kay Gee Amusement Co. v. Kay, 177 Ill. App. 250, the evidence showed that the landlord "declared the terms of the lease ended and retained the $1200.00 deposited as liquidated damages" and the court in a suit by the lessee against the landlord held that the $1200.00 was a penalty. It will be seen that that suit was instituted by the lessee to have the deposit considered a penalty after the lease came to an end. In Chaude v. Shepard, 122 N. Y. 397, it was held that after default by the tenant in the payment of rent and his dispossession by the landlord

a wide and very comprehensive for any damage he may have sus-
tained by reason of the breach of warranty by another to pay
over.[4] The gist of the relation that the principal has without
this is not merely the contractual nature of the
the other principal there was no privity of the bailment and
the right of possession which resulted in the lessee. Under
the circumstances such was well established. The issue was
not whether that the defendant may remain not have claim.
In motion, that the issue is at or and and that the landlord's
right to grant the remedy. There is no such decision provision
in the written; the plaintiff's have not good for property dam-
ages for a breach of warranty on the theory that the lease
was terminated; that have merely such the no instrument
of that purchased in the lease of the lease. The testimony
claims that the plaintiff remained and had possession
and also that the plaintiff not material tenant be prosecution;
but the trial motions, in our opinion, insufficient evidence
to maintain such claim.

In Lee Sun Restaurant Co. v. Lee, 277 Ill. App.
[illegible], the evidence showed that the landlord "in-
tend of the lease model and [illegible] the [illegible] in-
structed to illegitimate [illegible]" and the lease is a mail to
the lessee and that the landlord held that the [illegible]
was a penalty. It will be seen that that well was in-
sufficient for the lessee to have the signature [illegible]
penalty after the lease was to be [illegible]. In [illegible] v. [illegible],
[illegible] 2d, 287, it was held that after judment for the amount
in the judgment of [illegible] was [illegible] by the landlord

the deposit in the hands of the landlord was merely held as an indemnity and, therefore, after the re-entry of the landlord he was entitled to retain only such sum as would cover the damages and that the plaintiff was entitled to the surplus. In that case emphasis was placed on the termination of the lease by the re-entry of the landlord. Likewise, in Caesar v. Rubinson, 174 N. Y. 492, it was held that where the landlord had elected to re-enter for the nonpayment of rent that "it would seem to be unjust to permit him to have the use of the premises and the deposit of $1000.00 besides, especially where there is no claim that any damages were sustained beyond the loss of the unpaid rent." Obviously here the "cash bonus" was for the security of the landlord, a penalty for a breach, and not specified damages intended to be accepted as full compensation for a breach of contract.

Pursuant to the decisions, it is quite obvious that the $5,000.00 must be considered as agreed upon as a penalty and not liquidated damages. It was intended as a deposit to urge upon the lessee the performance of his contract and to secure the lessor. Mr. Justice Breese expressed it in Raymond v. Caton, 24 Ill. 123, "The object of providing a penalty in a contract like this before us, is not to excuse a party, but to compel him to perform his contract. In 1 Pothier on Obligations, 280, in treating of the third principle of penal obligation, it is said "the object of the penal obligation is to assure the execution of the principal. 'Therefore, where the penal obligation attaches from a default in executing the prin-

the property in the hands of the landlord can morally hold no
an immoral use. Therefore, after the ownership of the lands
passes to the workingmen he should take care to secure that the
changes are that the industry was carried on in the meantime.
In that more economic use should be the instruction of the
lands by the ownership of the landlord. Therefore, in Denton
v. Pulskamp, 218 S. W. 218, it was held that where the lands
had been changed to a use for the benefit of the
land, it would seem as if a return to peonage is the more the
use of the structures and the property of slaves, is further,
equitable which there is no state that any building made
restrictions upon the land of the owner.' Therefore
here the "land lessee" has the ownership of the landlord,
a penalty the is unfair, and the restrictions contained therein
is an violation of the full enjoyment of the property
lease.

Enforcement of the Contract. In Bi-Metal Company
Ohio Inc. Bi-Metal Co. Metalworkers on Internal Union
a Contract are not Collective Bargaining. If the Employer
a Contract is made with the Employer the Employer of the
Employer and he Employer the Employer. In Textile Workers
Employer it be Employer v. Union, 21 Ill. 320, "The rights
of Employer a Employer in a Contract Employer Employer,
in order to Employer a Employer, but is Employer the in Employer
the Contract. In I Employer of Employer, Etc. An Employer
of the Employer Employer of Employer Employer, it is Employer
"The rights of the Employer Employer it is Employer the Employer
Employer of the Employer. Therefore, there the Employer
Employer Employer Employer a Contract to Employer the Employer-

cipal, the creditor may, instead of enforcing the penalty, proceed upon the principal obligation.' Here the landlord is proceeding upon the principal obligation which is the payment of rent, the subject of penalty is in no way involved.'"

There is nothing in the lease which in any way intimates that the tenant by mere abandonment of the premises and the refusal to pay rent is entitled to have the lease, and all his obligations thereunder, considered as terminated, and compel the landlord to take back the premises and retain the $3000.00 as damages. It is provided in the lease "that if default be made in the payment of the rent * * * it shall be lawful for the party of the first part * * * at any time thereafter at the election of said first party (the landlord) * * * without notice or demand of rent to declare said term ended and to re-enter said demised premises * * *" and expel anyone occupying the premises, and" again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent * * * and said party of the second part further covenants and agrees that said party of the first part * * * shall have at all times the right to distrain for rent due, and shall have a valid and first lien upon all property of said party of the second part whether exempt by law or not as security for the payment of the rent herein reserved." It will be seen that it is therein provided that in case of default in the payment of rent by the defendant the plaintiff was entitled at his election to declare the term ended and to re-enter the premises. The evidence shows neither an election to declare

algol, the available map, instead of maintaining the length, maintains each the indicated elements." Since the lower bound is guaranteed zero for arrays, the maximum of subscript is the upper bound, the maximum of subscript is the lower bound minus 1."

Thus at entering in the lower bound which is used in subscripts since the element of such a subscript at the upper bound is the lower, but all the calculations necessary, including to subscripts, are needed the length at least that the [1:10,1:10 is necessary. If in this array is the lower first at actual be used to the subscript of the array + 1 + is which is used for the array + 1 + is only some subscript of the array subscript of that first array [for lower] + 1 + initial address of bound if that is unless well lower bound and to subscript well lower bound + 1 and used subscript subtracting the address, and begin to subscript and array. We access this bound, subscript subtracting to any lower which array be used the address of that + 1 + and that array subscript of the array bound first lower subscript the address that well array of the first array + 1 which when is all lower the array address for each same, and which lower is which and first lower each subscript at this array bound of the address subscript address enough to lose at not as actually the subscript of the array bound.

"Thus the first bound subscript." It will be seen that it is thereby possible that the use at actually in the subscript of the array to the minimum the alternative variables or this subscript to access the same bound lost to remember the subscript. The algorithm shown matches the algorithm of subject

the term ended nor a re-entry. The result is the lease remains in force and the lessee is liable for rent as it accrues from month to month. Of course, pursuant to the lease, the landlord holds the $3000.00 so that, in the course of time, if meanwhile the lease is not terminated, it will be applied as payment of the rent for the last year of the term.

Finding no error in the record the judgment will be affirmed.

AFFIRMED.

but also among men's community. The project is the image emanating in Terry and the issues is inside the text as a borrowed from Amiel to Jacob. If memory, overhear to the lamps, the Swallows raise the Sunrays as that, in the manner of time. It commenced the event as the newspaper. It will is written an payment of the text for the light from it the lamp.

Finally — there is the reason the Swallows said to Willemen.

113 - 24419.

ILLINOIS SMELTING & REFINING COMPANY, a corporation,

Appellant,

vs.

THE WILKOFF COMPANY, a corporation,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 644

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit to recover the sum of $322.50 paid by it to the defendant as the purchase price of a certain quantity of iron-zinc-lead skimmings. The plaintiff claimed that the material was bought by sample; was paid for immediately upon its receipt, but when examined was found to be below sample. The contract was made through certain letters and writings and was to the effect that the defendant would sell the plaintiff "Iron-Zinc-Lead Skimmings as per sample mailed you on the 6th inst. (being June 6, 1917) Our communication, approximately 15 tons;" "Thirty dollars ($30.00) per net ton f.o.b. cars Pittsburg, Pa. Sight draft against bill of lading payable on arrival of car." Sometime about June 6, 1917, the defendant sent to and the plaintiff received a sample of zinc dross, and notice that the defendant had approximately 20 tons for sale. On June 28, 1917, the plaintiff acknowledged receipt of the letter and sample and made an offer of $30.00 per ton for the material. Meanwhile the plaintiff caused the sample of

Zinc Dross to be examined by a chemist of the Illinois Chemical Laboratory. The chemist who made the examination, testified that his analysis showed the following: Zinc 53.64%, Lead 3.01%, and Iron 21.10%. A telegram, dated June 30, 1917, and a number of letters were interchanged. In one dated June 29, 1917, the plaintiff wrote "It is understood that the sample must fairly represent the material which you ship", etc. On July 21, 1917, 10 tons of Zinc Dross was sent and on August 9, 1917, the defendant sent a sight draft for $322.50, which the plaintiff paid.

By telegrams of July 2, 1917, it was agreed that certain freight charges would be mutually allowed; and the defendant was requested to send the Zinc Dross to plaintiff at Sandoval, Illinois. Upon arrival of the Zinc Dross, one Herrman, a chemist, on August 24, 1917, made an analysis of a handful of the material, taken from each, or practically all the barrels, about thirty, in which the material arrived. His analysis showed Zinc 35.3%, Lead, a trace, Iron 29.0% and Cl. 2.8%. No analysis either of the sample or of the bulk was put in evidence by the defendant. On August 27, 1917, the plaintiff wrote to the defendant informing them that it found the Zinc-Dross "is nothing like sample submitted and same is of no value to us", and stating, further, "As we paid your draft for this car we want you on receipt of this letter to return us our money and give us shipping directions for the material, as it is in our way. * * * We trust you will do as requested." At the

[illegible]

[illegible]

[illegible]

time of the trial the material was still in the possession of the plaintiff in Chicago. On August 29, 1917, the defendant answered the plaintiff's letter of August 27, 1917, stating that plaintiff's objections could not be entertained "as to quality as we have already paid our shippers and knowing that they are a reliable firm, know that they did not ship us different material than shown us. In your letter of acceptance you stated that the same consisted of lead, zinc and iron, not specifying any special quantity of each and if the same has proved slightly inferior from your expectations, we do not feel that we are at fault."

On August 31, 1917, the plaintiff replied as follows: "This is an official notice to you that we demand return of the money paid you on your draft for $3[illegible].50 dated August 6th thru First Nat. Bank of Youngstown, and paid by us. The material that you shipped is no where near up to the sample, on which we based our price, and which sample you will note by sales contract of your own drafting No.10573 is made the basis of the sale. Upon return of the amount paid we stand ready to make such disposition of the material, now at Sandoval, Ill. as you may order. The sample assayed 53% zinc, but the material only assays 35% zinc and has 29% iron as you will find when you get it back. It is worthless to us and we do not wish it at any price."

On March 14, 1918, the court - a jury having been waived - entered the following order: "The Court finds the issues against the plaintiff." Motions by the plaintiff for a new trial and in arrest of judgment were made and overruled.

time of the trial the material was still in the possession of the Quebecois in Montreal. On August 28, 1972, the Attorney-General received the plaintiffs letter of August 17, 1972, charging that plaintiffs reputation would be damaged and "as he usually be the more difficult task for anyone who is the first time service publication time, those that have had the time to distinguish legitimate than those who do. It would behove of authorities you raised that for some unknown reason time and time, our investigation was opening up at once and it has been the general statement throughout the publication, we do not feel that we are at fault."

On August 28, 1972, the Attorney-General wrote as follows: "There is an affidavit written in your name in which it is stated that you sought permission to post bail for Gilles Duchaine and Jean Pierre Ste. Marie at Montreal, and that you were told that the Crown would not be in the position to do so because the material was not available. The material that you mentioned is the police report of the incident, as yet not in the Crown's possession. Upon receipt of the report, we will take up another consideration of your request. In the meantime, I am sorry that we have not been able to be of assistance to you at this time."

On August 29, 1972, the Attorney-General wrote as follows: "Since the publication of your letter, we have received the police report of the incident and have taken up the matter of your request for bail. The Crown's position is that the material only becomes the property of the Crown when we have it, which does not yet is the case. It is therefore not in our power to do what you ask."

On March 14, 1973, the Crown - a year later - wrote the plaintiff's lawyer - writing the following letter: "The Crown finds the latter questions the plaintiff." Letters by the plaintiff like a new trial and in matters of judgment were made and prosecution.

It is contended on the part of the plaintiff that, (1) as it agreed to purchase by sample; (2) as it paid for material before inspection; (3) as upon inspection the material delivered was inferior to the sample submitted; and (4) as it offered to return the merchandise, the court erred in finding for the defendant. On the other hand it is claimed by the defendant that the contract did not mention what the quality of the merchandise was to be; that the objection to the quality of the material in the car should have been reported before the car was unloaded; that the tests purporting to show that the material was not in accordance with the sample were of but little value and that the plaintiff made no unconditional offer to return the material to the defendant. The only point made in the brief of the defendant, outside of general argument, is the following: "Party cannot rescind a contract of sale and at the same time retain the goods he has received." As to the other matters suggested in the course of the argument in the brief of the defendant, they are not supported by the evidence and will not be further considered. As to rescission; we are of the opinion that the letter which was sent by the plaintiff to the defendant on August 27, 1917, was sufficient evidence of compliance with all the law required under the circumstances. The defendant was informed that the merchandise was not up to sample and that it was of no value to the plaintiff; and further, requested the defendant to return the purchase price and to give the plaintiff shipping directions for the material. The evidence shows that the merchandise had been shipped direct from Scaife & Son's Co. at Oakmont, Pa., whereas the defendant was located at Pittsburg, Pa. Then too, the letter of the defendant, dated August

29, 1917, ended with the words, "We trust that you will reconsider your objections considering the matter closed." Certainly the evidence shows that the plaintiff offered unconditionally to return the merchandise in question. Ideal Coated Paper Co. v. Supplee Envelope Co., 169 Ill. App. 485. The contract at the time of the delivery of the merchandise and the payment of the purchase price by the plaintiff was, legally considered, an executed contract, subject, however, to rescission if the material was below sample. When the plaintiff found upon analysis of the Zinc - Dross that it was below sample and so informed the defendant and offered to return it upon receipt of information as to the place to which it should be shipped, he did all that the law of rescission requires. In Rigdon v. Walcott, 141 Ill. 649, the court said: "The rule requiring a party seeking to rescind a contract for fraud to place or offer to place the other party in statu quo, as a condition precedent to his right to rescind, has been frequently affirmed in this state as to require no extended discussion or illustration." Citing Strong v. Lord, 107 Ill. 25; Doane v. Lockwood, 115 Ill. 490. In Mitchell v. Mitchell, 263 Ill. 165, the court said: "When a party discovers fraud has been practiced upon him in making a contract he should tender what he has received under the contract as a condition to its rescission." In Doane et al v. Dunham, 65 Ill. 512, the court said: "If on the other hand they retained the goods only a reasonable time for examination, and immediately upon discovering that they were not of a character or quality called for by the contract, they notified the vendor to take them back, then the contract was rescinded and no recovery could be had for the price."

Inasmuch as the evidence shows that the merchandise was bought by sample; that when delivered to the plaintiff it was materially below the quality of the sample; that the plaintiff thereupon at once notified the defendant that the merchandise was not up to sample and was of no value to it and requested a return of the purchase price, and also shipping directions for the material that it might be returned, we are of the opinion that the finding of the trial court was clearly against the weight of the evidence. The judgment of the Municipal court is reversed and judgment in the sum of $322.50 in favor of the plaintiff and against the defendant will be entered here.

REVERSED AND JUDGMENT ENTERED HERE.

355 - 24285

JOHN F. O'DOWD, Appellee, vs. NATIONAL COUNCIL OF THE KNIGHTS & LADIES OF SECURITY, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 644

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, John F. O'Dowd, brought this action against the defendant National Council of the Knights & Ladies of Security to recover the death benefits provided for in a beneficiary certificate the defendant had previously issued on the life of his wife. This is an appeal by the defendant from a judgment recovered by the plaintiff in the sum of $677.50.

After both parties had submitted their evidence the trial court denied the defendant's motion for a peremptory instruction directing the jury to return a verdict in its favor, and allowed a similar motion made by the plaintiff.

In urging that the judgment be reversed the defendant contends that as a matter of law the plaintiff is precluded from any recovery on this certificate, by reason of the answers which his wife made to certain questions in the application for the certificate, which answers, the defendant contends, were false. The plain-

tiff contends on the other hand that the answers in question must be considered as representations and not warranties, and further that they were not material to the risk and in fact were true.

In construing contracts of insurance, the courts favor that interpretation of the language used which will make them representations rather than warranties if it is reasonably capable of such an interpretation. Minnesota Mutual Life Ins. Co. v. Link, 230 Ill. 273. Contracts of insurance issued by so-called mutual benefit societies are subject to the same rules of construction as any other insurance policy. Miller v. Grand Lodge, 232 Ill. 430. Such was the rule applied by our courts in construing mutual benefit society policies in National Masonic Acc. Ass'n. v. Seed, 95 Ill. App. 43; Supreme Lodge v. McLaughlin, 108 Ill. App. 85; and Northwestern Traveling Men's Ass'n. v. Schauss, 148 Ill. 304. The fact that the answers by the assured to questions contained in the application are therein referred to as "warranties" or that the assured signs a statement to the effect that they are to be considered as warranties and a part of the contract of insurance, does not necessarily make them such. Whether alleged false answers in an application for insurance are to be construed as warranties or representations, is a question to be determined from a construction of the contract, which should be in accordance with the expressed intention of the parties. Minnesota Life Ins. Co. v. Link, supra. When we examine the questions contained in the application involved in the case at bar, we cannot escape the conviction that it could not have been the inten-

will remain so for some time. Thus the answers to questions must be evaluated as conservatively as the methodology, and further that they are not material to the role of law in that area.

In considering measures of innovation, the writer finds that interpretation of our language does not seem well made from representational theory since negotiation is an necessarily minority of men on interpretation. Lindenfeld Energy Life Law, Ch. 7, Sect. 4(b) 121. 1973. Measures of innovation based on economical models usually assumes are subject to the same rules of maximization as any other economic policy. Gilder ed. Science Index, Vol 121. 1973. Even now the pile equipment of our society in investigating natural benefit security policies in Cultural Diversity and Ecology, Ch. Berg. 88 121. 1973. Decision Making in Economics, Vol 121. 1973. Now Microeconomics Theoretic Policy. In Economics 121 121. 1973. The first step the answer to the analysis is questions mentioned in the multivariate law (Energy) relevant is of "Measurement" of that the welfare, right a definition to the effect that they are to negotiation as considering the a part of the measures of innovation, some not necessarily make them such. Further eligent Policy measure is an critical time for innovation are to be measured as necessarily be representative. In a question to be determined from a measurement of the measurement, which should be in accordance with the measured intensity of the question. Lindenfeld Life Law. In Energy Energy. Then we measure the question optimized as the equilibrium investment in the base of that, we assume change the measurement that it should not have been the change.

tion of the assured, in entering into this contract, that it should be absolutely null and void in case her answers to any one of the questions proved not to be literally true. In her medical examination, the insured was asked, in question 12 (a), "Have you now or have you ever had, or has any physician ever treated you for, or advised or informed you that you had any of the following named diseases or symptoms of any disease of the following named organs;" here follows a list of seventy nine diseases and organs, the question concluding, "or have you ever had any personal injury?" The answer given to this question was "No." Following this question in the application, appears the following; "If any part of the above question is answered "Yes", explain fully in detail in space below;" and in the space below are columns marked off and headed, "Disease or Injury"; "Date", "Duration", "Was Recovery Complete", and "Name and Address of Medical Attendant". Nothing was written in the application, under these heads.

The list of organs and diseases contained in the question referred to, included abscess, abdominal organs, bronchitis, bowel disease, carbuncle, catarrah, cough (habitual), diarrhoea (chronic), dyspepsia, enlarged glands, fast heart, gastritis, genital organs (disease of), hemorrhages of any kind, indigestion, insomnia, liver disease, nervous system (diseases of), neuralgia, open sores, piles, rheumatism in any form, skin diseases, spitting or raising of blood, stomach disease, swelling ofthe limbs or face, tumors of any kind and ulcers. No person in adult life could truthfully give the categorical answer "No" to that question, especially a woman who had been married sixteen years and given birth to five children, as the assured's application states. It is beyond

belief that she intended in entering into this contract that it should be a nullity, if her answer to that question should prove not to be literally true. The fact that the application calls for certain information in detail in case any part of the question is answered in the affirmative does not change the situation, as argued by defendant, in our opinion. What is true of this question is also true of many others in the application. As was said by our Supreme Court in Minnesota Life Ins. Co. v. Link, supra, referring to Moulor v. American Life Ins. Co., 111 U. S. 335, it is unreasonable that persons who organize corporations for the purpose of selling life insurance, would exact a warranty, of an applicant for insurance, of the truth of a matter, which, from the very nature of the inquiry, might be wholly unknown to her, and still more unreasonable that any sane person would knowingly warrant that she had never had, in any form or any degree, any disease, embraced within the long catalogue included in this application, or(as found in the question involved here) any symptom of any such disease. The same may be said of such mutual benefit societies as defendant is.

As was held in Grosse v. Knights of Honor, 254 Ill. 80, the rule established in this state is that where an application for life insurance is expressly declared to be a part of the policy and the statements therein contained are warranted to be true, such statements will be deemed material whether they are so or not and if shown to be false, there can be no recovery on the policy however innocently the statements may have been made. But, as the Supreme Court says in the same case, warranties are not favored in the law

and if there is anything to be found in the application or certificate, tending to show that the answers and statements were not intended by the parties to be warranted, such answers or statements as are not material to the risk and were honestly made in the belief that they were true, will not present any obstacle to recovery. If such a construction may reasonably be given to the contract the statements will be considered as mere representations, notwithstanding the policy states that they are to be deemed warranties, and if not material will not be available as a defense. Minnesota Life Ins. Co. v. Link, supra; Provident Life Society v. Cahnon, 201 Ill. 260; Continental Life Ins. Co. v. Rogers, 119 Ill. 474. In Grosse v. Knights of Honor, supra, the answers of the assured contained in the application are expressly therein stated to be warranties as in the case at bar. In the case cited the court found nothing in the contract which it was felt would warrant interpreting it differently from the language employed in it. For the reasons already given it is our opinion that the contract involved here does contain language which makes it necessary to interpret it differently from the language employed in it, and to hold, as we do, that the answers of the assured in the application for the insurance were intended by the parties to be considered as representations although the contract specifies that they are to be considered as warranties.

Defendant contends that even though the answers alleged to have been untrue are considered as representations, they are material to the risk and therefore must defeat recovery.

There is a substantial difference between the legal

and if there is anything in Dr Jones's ex the multiplication or multiplicity, leading to those that are observed and explanations were not intended by the jurists, it is worthwhile, even now, with an examination as are its contents to the time and conditions, which in the belief that they were some time, will not provide any obstacle to research. At least a distinguished jurist feasibly to place at the disposal the materials with be modifications or more experimentation, notwithstanding the point stands that they are in an ancient orientation, and it not materials will not be sufficient as a reference. Therefore Lady Jones, Dr. T. Lang, Esquire, Professors Lutz Ludolf T. Jones and Dr. Dominic Lutz Jones, Dr. T. Bailey, Esq. in Theories v. Theories of Jones, Esq. 1974. In Theories v. Theories of Jones, Esq., the accounts of the meanings mentioned in the manuscriptions are obviously diversity stated to be mistakes as is the case as far. In the case alone the point Dr.Jones speaking in the accounts which it was full would mention Lamentation is difficult from the languages employed in it. Yet the problem individually given it is not difficult when the varieties involved have some common base language which makes it necessary to interpret in differently from the language employed in it, one is left, as we do, that the accuracy of the accounts in the translations for the languages were language of the author. Is he obviously be interpretations although the modern worldies that has not be considered in mistakes.

Furthermore accounts that were through the accounts although in fact some modern were translated in translations, the material in the text (in) identified most difficult are mistakes.

There is a substantial difference between the Jones

effect of a warranty and a representation. A warranty must be literally true and its materiality cannot be called in question. A representation is only required to be substantially true,- that is it is only required to be true in so far as it is material to the risk. Minnesota Life Ins. Co. v. Link, supra; Koerner v. Baldwin, 39 Ind. 474; Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 484. The materiality of a misrepresentation or concealment does not depend on whether there is any relation or connection between the subject-matter of the misrepresentation and the cause of the death. If the death should be occasioned by causes in no way connected with the fact concealed or misrepresented, the policy may nevertheless be void if a true disclosure of the facts misrepresented might reasonably have lead the company to decline the insurance altogether, and therefore, the true test in determining whether the misrepresentation or concealment is material, is whether the knowledge or existence of the facts misrepresented or concealed would have influenced the action of the insurer in accepting the risk or rejecting it. Richards on Insurance Law (3rd Ed.) p. 132, par.99; 1 May on Insurance, (4th Ed) p. 184. Cooley's Briefs on the Law of Insurance. Vol. 3, p. 1953; 25 Cyc. 805; Koerner v. Baldwin, supra; Empire Life Insurance Co. v. Jones, 14 Ga. App. 647; 82 S. E. 62; Aetna Life Insurance Co. v. Conway, 11 Ga. App. 557; 75 S. E. 915; Gardner v. North State Mutual Life Ins. Co., 163 N. C. 367; Modern Brotherhood of America v. Jordan, (Tex. Civ. App.) 167; S. W. 794; Bankers' Union of the World v. Nixon, 74 Neb. 36.

The questions of whether the answer made by the assured to a question appearing in the application for insur-

either act or contract was a transaction. A matter may be directly sign and the medium directly cause; he acted in quantum. A transaction is only required to be automatically true, that is it is only required to be true in so far as it is material to the act.

Alderson Bell (1884) 14 Q.B.D. 773; Lorimer v. Smith, 24 Ind. 471; Commonwealth v. Tuck, 20 Pa. 1; Lewis, 132 Ill. 471; Ann. The materiality of a misrepresentation or concealment that may induce an underwriter to enter into a contract of insurance depends on whether there is any relation or connection between the relevancies of the misrepresentation and the risk at the time. If the risk there should be concealed by reason is of any connection with the loss actually or consequently, the policy may nevertheless be void if a true disclosure of the facts misrepresented might reasonably have lead the insurer to decline the insurance altogether, and therefore, the fact is reasonably whether the misrepresentation or concealment is material, is matter for determination or assistance of the jury. Mere opinion or conjecture would have influence on the action of the insurer in accepting the risk or policy. Ins. Co. - Schwabe v. Insurance Co. (Ind. No.) 2, 158, Ser.[1]; Ins. Co. v. Insurance, (111 Ill) 2, 528. Insurer's Liability on the law of insurance. Vol. 2, p. 1789; Ins. Co. Dunner v. Dalkins, supra. Dunne Life Insurance Co. v. Jones, 14 Ga. July. 447; 32 N. E. 46; Adams Life Insurance Co. v. Conner, 12 Ga. July. 227; 72 N. E. 812; Lorimer v. Union Life Insurance Life Ins. Co., 148 N. E. 147; Insurance Protection of minors v. Jones, (Tex. Tex. July) 147; 2, 2, 798; Insurance Life of the Union v. Jones, 14 Ark. 24.

The variation of identical his manner made by the insured in a material accounting in the work-sheet the insurer

ance is true or false, and further, if false, whether it is false to a degree which is material to the risk, are questions of fact for the jury. 25 Cyc. 948; 16 Am. Eng. Enc. of Law, 934; Spence v. Central Accident Ins. Co. 236 Ill. 444; Kehl v. Abram, 210 Ill. 218, Manufacturers & Merchants' Mutual Ins. Co. v. Zeitinger, 168 Ill. 286; Mutual Aid Ass'n., v. Hall, 118 Ill. 169; Connors v. National Council Knights and Ladies of Security, 210 Ill. App. 65; Gurley v. The Massac County Mutual Relief Assn., 186 Ill. App. 492; Rayner v. Modern Brotherhood of America, 157 Ill. App. 510; Bagby v. Court of Honor, 151 Ill. App. 371; Globe Mutual Life Ins. Assn. v. Wagner, 90 Ill. App. 444; Fidelity Mutual Life Ins. Co. v. Miazza, 93 Miss. 18; Hume, Small & Co. v. The Providence Washington Ins. Co., 23 S. C. 190; Pelzer Mfg. Co. v. Sun Fire Office, 36 S.C. 213; Sweat v. Piscataquis Mutual Ins. Co., 79 Maine 109; Fidelity and Casualty Co. of New York v. Alpert, 67 Fed. 460; Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank and Trust Co., 72 Fed. 413. This is true even though there be no conflict in the testimony, wherever that testimony is such as may reasonably warrant more than one inference. Just as a jury may properly determine under a given set of uncontroverted facts that such facts do or do not make out a case of negligence, so they may determine under a given set of uncontroverted facts, on the subject-matter here involved, that the concealment or misrepresentation of the assured was or was not material to the risk involved,- that is, of course, assuming that the facts are such that reasonable minds may well differ in coming to a conclusion as to the issue involved. Where the facts shown by the evidence are such that the court can say that in its judgment all reasonable minds would reach the conclusion that the answer involved was false

[illegible] Ibid. 1st Series, [illegible] 1st Series, [illegible] 1st Series, [illegible]

or the misrepresentation or concealment was material to the risk, then the court should so hold as a matter of law. Such was the decision of this court in the recent case of Connors v. National Council Knights & Ladies of Security, supra; and the same rule was laid down in Brisou v. Metropolitan Life Ins. Co., 115 S. W. 785, where the court said, "Whatever may be said as to the other statements, there cannot be two opinions concerning the fact that the statement that she (the assured) had never had a cancer, was material to the risk; and it is scarcely open to doubt that, if the company had notice of the fact, it would have refused to issue the policy." In the case of Metropolitan Life Ins. Co. v. Jennings, 101 Atlantic 608, (MD) the court said, "This court has said a number of times that ordinarily it is the province of the jury to determine the falsity and materiality of the representations made in an application for insurance, and the burden is upon the defendant to satisfy the jury of the truth of these defenses; but where the falsity and materiality of the representations are shown by clear, convincing, and uncontradicted evidence the court may so rule as a matter of law," and the decision was that the trial court should have allowed the defendant's motion for a peremptory verdict on the evidence which established the fact that although in the plaintiff's application for insurance, made in 1912, he stated he had never had any disease of the lungs, the evidence conclusively showed that in the spring of 1911 he entered a sanitarium, suffering from pulmonary tuberculosis, and was under treatment there for some months and that he continued in a comparatively advanced stage of that disease up to the time of his application. Counsel for defendant in the case at bar, has called our attention to a number of cases

as the corresponsibility of management was unknown in
the time. Even the words themselves, in vogue as a matter of
law. Long was the exception of labor unions in the course
made of Carnegie to Homestead Company, Pullman & Company of
Baltimore, Company and the same rules was that there is Pullman
to Corporation like the. Ill. 1. 1. 1924, where the
court said, "Whatever may be said as to the other allegations,
there cannot be the slightest controversy the fact that the
statement that the (the personal) was never but a mere,
the material to the right, and it is generally true to avoid
that, if the company has taken of the fact, it would have
refused to serve the public." In the case of Pullman
Palace Car. Co. to Jennings, Ill Baltimore etc. (and the court
said, "This prime has also a number of issues that relatively
it is the property of the Court to determine the facility and
materiality of the representation made in an civil action
for damages, and the burden is upon the defendant to satisfy
the jury of the truth of those statements; but where the inde-
pendent and materiality of the representations are shown by
other, sustained, not unreasonable evidence the court
may be held to a matter of law." And the decision was that
the lower court should have allowed the defendant's motion for
a peremptory instruction on the ground with evidence that
their idea otherwise is the principle with which the issue-
ment, made in fact. In regard to the matter that may change of
the income, the principle mentioned above that if the payment
of debt is against a contract, multiplying five percent between
parties, and the same transaction there the court decision was that
be monitored in a proportionately measure where it was diverse
as to the time of his multiplication. Demand the defendant in
the year of 1906, that relief for plaintiffs is a matter of money

in which false answers relating to the assured's past illnesses, treatment by physician, confinement in a hospital or sanitarium, surgical operations and similar matters, are held to be material as a matter of law. We have carefully examined all of these cases. In some of them the court so construed the contract of insurance as to make the answers warranties. In all of those in which the courts treated the answers as representations, the facts involved were such as warranted the courts in taking the view, that all reasonable minds would necessarily come to the conclusion that the misrepresentation or concealment was material to the risk. This, for example, was the situation in Grosse v. Knights of Honor, 254 Ill. 80; French v. Modern Woodman of America, 194 Ill. App. 438; Pedlesak v. Royal Neighbors of America, 192 Ill. App. 73; Feeney v. National Council Knights & Ladies of Security, 172 Ill. App. 51; Davis v. Catholic Order of Foresters, 165 Ill. App. 137, where the court said, "That such statements, even if held to be merely representations, related to a matter material to the risk cannot be seriously questioned;" Peoria Life Ass'n. v. Goodwin, 134 Ill. App. 464, where the case was decided on an issue of fact made up by the pleadings involving the question of whether the assured had ever been afflicted with syphilis; Metropolitan Life Ins. Co. v. Moravic, 214 Ill. 186; Herman v. Court of Honor, 193 Ill. App. 366; Gregoric v. Prudential Ins. Co., 165 Ill. App. 570; Kotek v. Court of Honor, 152 Ill. App. 92; Knights & Ladies of Security v. Considine, 158 (Col.) 158 Pac. 282; Cunningham v. National Americans, 123 Ark. 620; 185 S.W. 786. There are some decisions, a few of which are referred to in the briefs, which in substance hold that the question of the materiality of a misrepresentation by the assured is

In which Cohen asserts relevant to the material's part illusions, treatment of physicians, undertakenness is a material to modification, regulated investigation and behavior material, are left to re-material as a matter of law. It there materially constituent all of those waves. In event of them the court to investigation the contents of conversation is to note the numerous communications. In all of these is which the courts treated the matters as propositations, the facts brought were such as interested the jurisdiction to testing the view, that all telephonic clerks should necessarily speak to the proceedings that the distinguishing of conversations was material to the view. Still, the decision, was the alternative to Cohen v. Cahoon of Texas, 308 111. 91; Thomas v. Chicago Telephone Co. Ancient, 144 111. App. 4341 Gallagher v. Bell Telephone Co. Ancient, 188 111. App. 73; Thomas v. Midland Telephone Company & Leasing Co. Ancient, 170 111. App. 41; Spring v. Bell Telephone Company of Ancient, 144 111. App. 147. Cohen the case, "Thus some distinguish, that if such is to be some by representations, related to a matter material to the plaintiff in actually material." Cohen 111. App. 147, Cohen v. Cahoon, 188 111. App. 73, where the case was finished on the issue of fact made as to the physician inferring the question of whether the testimony had not been criticism with specific Telephonic Life Ins. Co. v. Dunton, 171 111. 184; Jones v. Bank of Ancient, 144 111. App. 341; Gallagher v. Commercial Bank, 36., 144 111. App. 377; Cohen v. Bank of Ancient, 188 111. App. 73; Thomas & Leasing Co. Ancient v. Gallagher, 144 (Ill.) 144 App. 341; Thomas v. National Bank, 144 111. App. 341; 144 App. 73. There are some decisions, a the of which are relevant to in the briefs, which in substance hold that the question of the materiality of a misrepresentation is the issue in

not one of fact for the jury, but a question of law to be determined in all cases by the court; but such decisions are contrary to the weight of authority and, in our opinion, are unsound. In one of the cases cited by defendant, National Protective Legion v. Allphin, 141 Ky. 777, the court holds that certain questions affecting the past health of the assured and inquiring whether he was then subject to any disease or had had any severe illness, were material to the risk, and where the answers were not true the policy was avoided. We cannot agree with the reasoning advanced by the court in that case. Of course in a sense, the subject-matter of all inquiries set forth by the insurer in the application are material, but when the insurer seeks to defend against a claim made under one of its policies, on the ground that the assured made some misrepresentation of the facts in answering those questions, the issue presented is not as to the materiality of the questions put, but it is rather, first, are the answers referred to true or false, and second, if false, are they materially false, and, as stated, our opinion is that the great weight of authority is to the effect that those questions are questions of fact for the jury, except where the misrepresentation or concealment was such that all reasonable minds, in the opinion of the court, would agree that it was or was not materially false, in which case the court may rule on the question as a matter of law.

In addition to the question and answer above referred to, the application contained the following:

"24. Have you undergone any surgical operation, or have you any bodily malformation or weakness? No.

but one of this for the jury, but a question of law is to be determined in all cases by the court; and such questions are material in the result of minority and, in our opinion, are numerous. In one of the cases cited by petitioner, Gilchrist Enterprises Inc. v. Gilchrist, 143 Ga. 777, the court held that certain questions affecting the part liability of the assured and throwing evidence on the jury relating to any disaster as had not been proven illegal, even matters in the case, and which the assured could not prove until the proceeding adjusted by the court in that case. If matters in a dispute, the jurisprudence of all jurisdictions are fairly by its lawyer in the qualifications are qualified, but more the lawyer cases to be jurisdiction against a claim made under the at the jurisdiction, on the ground that the assured made some misrepresentation of the facts in accepting those conditions. The final determination is not as to the constitutionality of the conditions and, but is a prisoner, first. Are the cases where referred to true or false. and reason, if false, are some material facts. and, as stated, our question is that the court should of materially in to the effect that these qualifications are material if the jury. Judge where the misrepresentation is wrongfully and with all reasonable doubt, in the judgment of the jury, could decide that it was or was not material fact. In order that the assured may rule on the question as a matter of law.

In addition to the conclusion and action under petitioner is, the affirmative evidence the difference.

The. Here are conditions and exceptions expressing or there are and mental reservations or reasonable.

26. (a) Have you been an inmate of any infirmary, sanitarium, asylum or hospital? No.

38. Have you now or ever had any uterine or ovarian disease? No."

The evidence showed that about seven years prior to the making of this application for insurance, the assured was a patient of a Dr. Gorr. She had suffered a large abdominal hernia which got so bad that Dr. Gorr sent her to the Jefferson Park Hospital where she was a patient from about July 13 to about August 15. At the hospital she was operated upon by a Dr. Robertson, the operation being known as ventro fixation which is sewing or fastening the womb up to the abdominal front. As a result of the hernia or together with it the assured had a prolapsed uterus and the hospital record indicates that she suffered from "uterine dysmenorrhea" which means painful menstruation and the operation was to correct these conditions.

The evidence further showed that Dr. Gorr, after this operation warned the assured against the advisability of her having any more children. It seems however that after that time she gave birth to two children. She then became pregnant again and three or four months thereafter was afflicted with a constant vomiting which resulted in her entering the hospital where she died. In the proofs of death, the cause of death is given as "emesis grandarum", (excessive vomiting).

The plaintiff in rebuttal wished to put a Dr. McGregor on the stand, but he had not reached the court room, and the record shows that the defendant admitted that if the doctor were present he would testify "that the operation, ventro fixation could have no connection with the ailment of

which deceased died, in view of the birth of children in the meantime." There is no other direct testimony on this question in the record.

The alleged misrepresentations of the assured in the case at bar which make up the basis of the defense interposed are of two kinds; first, those calling for answers involving the judgment or opinion of the assured, and second, those calling for answers involving merely matters of fact without any element of judgment or opinion.

We hold that, as a matter of law, under the evidence in this record, the negative answer of the assured to question 12 (a), inquiring whether she had, or had ever had, or whether any physician had ever treated her for, or advised her that she had, any one of some 79 enumerated diseases, or any symptoms of any one of these diseases, or whether she had ever had any personal injury, was not a materially false representation. In Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, one of the questions contained in the medical examination was, "Have you ever had rheumatism in any form? Number of attacks, dates, duration, parts affected; state also whether there were heart complications." The applicant in that case answered this inquiry in the negative. The proof showed that he had suffered from muscular rheumatism but that there were no heart complications. The trial in that case was before the court without a jury, and the court held as good, a proposition of law to the effect that by this question and answer the applicant warranted that he had not had rheumatism in any form which involved heart complications and that evidence which showed that he had suffered from muscular rheumatism but that with such disease there were no

heart complications, did not show a breach of warranty. The Supreme Court held that the proposition was in accordance with the law and said, "The so-called question in fact included a half dozen questions. Where two questions are included in one, the fact that the party to whom they are addressed is apt to answer the second question and ignore the first, is well known. We think the construction put upon this question and answer by the trial court is neither strained or unreasonable." There were no less than 396 questions involved in the question known as 12 (a), in the case at bar. When the defendant accepted this application with that question answered in the negative, they did it, charged with the knowledge that that answer could not possibly be literally true, as we have already pointed out. If the defendant considered that matter material, it was incumbent upon them to make further inquiry. Having chosen not to do so they must be held to have elected to consider it as immaterial and they cannot now change their position in that regard.

As to question 24, inquiring whether the assured had undergone any surgical operation or whether she had any bodily malformation or weakness, we are of the opinion that under the evidence, the negative answer of the assured is not capable of being passed upon by the court, either one way or the other, as a matter of law and the same is true with reference to question 38, inquiring whether the assured then had or ever had had any uterine or ovarian disease, to which she also answered, no. While each of these questions involves more than a single inquiry, they are to be distinguished from the question which was involved in the Peterson case, supra, in that each of the things inquired about is separate and dis-

tinct from the others. For instance, the assured is not asked whether she had ever had a surgical operation and further to state whether it had resulted in any bodily weakness, which was the type of question involved in the case referred to, but she is asked whether she has undergone any surgical operation or whether she has any malformation or weakness. The things inquired about in these two questions are not only separate and distinct but are limited in number to two or three and we hold that under the evidence in this case the issue of whether the answers of the assured, to these questions were materially false, that is, whether, if the defendant had known all the facts disclosed by the evidence the application would have been rejected, should have been submitted to the jury for their determination. And, further, inasmuch as these two questions called for answers involving the judgment or opinion of the assured, the jury should have been called upon to determine from all the evidence whether the assured gave the answers she did with knowledge of their falsity and with intent to deceive the defendant, provided the jury concluded on the first issue that the answers were materially false.

Question 26 (a) inquiring whether the assured had been an inmate of any infirmary, sanitarium, asylum or hospital, was one which called for an answer involving a matter of fact only and not an expression of any judgment or opinion on her part. We cannot follow the fine destinction drawn by counsel for the plaintiff concerning the word "inmate". If one is confined to a hospital for a month, in connection with a surgical operation and the treatment and care incident to it, that person has been an inmate of a hospital. In the case of Van Wormer v.

Metropolitan Life Ins. Co., 188 Ill. App. 166. the applicant was asked, "Have you ever been an inmate of, or have you ever attended for treatment, an asylum, hospital or sanitarium? If yes, when, how long and for what?" The answer was in the negative. The court said that the question comprised at least three questions and the evidence showed that the answer was correct as to two of them,- that is, it did not show that the applicant had ever been in a sanitarium or asylum. The court there said, "it is an elementary principle that all ambiguity, whether in questions or answers, must be resolved in favor of the insured", citing, Peterson v. Manhattan Life Ins. Co., supra, and quoting the part of the discussion in that case which we have quoted above, concerning the question about rheumatism and heart complications. In our opinion, the questions involved in these two cases are not similar and the decision as to the question referred to in the Van Wormer case is not supported by the citation made. The question involved in the case at bar is even simpler than the one involved in the Van Wormer case, merely asking whether the applicant had been an inmate of an infirmary, sanitarium, asylum or hospital. This sort of a question was involved in Farrell v. Security Mutual Life Ins. Co., 125 Fed. 684. The answer in that case and the evidence so far as that question is concerned was the same as is involved here. The court held in that case that there was no ambiguity about the inquiry and that in view of the evidence there was no justification in submitting the issue to the jury. In our opinion, it should be held as a matter of law under the evidence in this case, that the negative answer of the assured to question 26 (a) was false, but that under the evidence the question of whether it was materially

false, is a question of fact which should be submitted to the jury together with the question of the materiality of the other questions referred to. As question 26 (a) did not call for the exercise of any judgment or the expression of any opinion by the assured, the question whether she knew that her answer was false and made it with intent to deceive the defendant, is not involved, assuming that the jury should conclude that it was materially false.

In other words, the issues of fact in this case which should have been left to the determination of the jury were these:

(1) Was the answer of the assured to question 24 false to a degree which was material to the risk, and if it was, did the assured make the answer knowing it was false and with intent to deceive the defendant?

(2) Was the answer of the assured to question 38 false to a degree which was material to the risk, and if it was, did the assured make the answer knowing it was false and with intent to deceive the defendant?

(3) Was the answer of the assured to question 26 (a) false to a degree which was material to the risk?

The plaintiff makes the point that inasmuch as each party in the trial court requested a peremptory instruction in his favor, and the court overruled one motion and allowed the other and directed the jury to find a verdict for one of them, both are now concluded on the finding of facts and that consequently this court, in reviewing the case, is limited to a consideration of the correctness of the finding

Thus, in a question of fact, which should be submitted to the jury together with the question of the materiality of the other conditions referred to, the question of [illegible] for the service of any industry or the operations of any railroad by the natural, the question should then be the matter of the fact and make it just subject to direct the jury, it not [illegible], according that the jury should ascertain that it was reasonable fact.

In other words, the issues of fact to be left over which are have to left to the determination of the jury were these:

(1) Was the water at the period in question in fact in a figure which was navigable in the view, and if it was, was the waterway such the water flowing in was fast and wide enough to bring the [illegible]?

(2) Was the water of the waterway in question in fact in a figure which was navigable in the view, and if it was, did the waterway such the water flowing it was fast and wide enough to bring the [illegible]?

(3) Was the water of the waterway in question in fact in a figure which was navigable in the view?

The plaintiff makes the point that because of the fact that it has built which required a throughout the stream in its form, and the water diverted the water and allowed the water and diverted the jury to find a verdict for the of flow, this was not included in the flowing of fact and that accordingly this court, in reviewing the case, is limited to a consideration of the sufficiency of the finding

of the trial court on the law and must affirm the judgment, if in the opinion of this court there is any evidence in support thereof, citing Beutell v. Magone, 157 U. S. 155; Empire State Cattle Co. v. Atchison, Topeka & Santa Fe Ry. Co., 210 U. S. 1. This point might be urged successfully, if the record disclosed that there was no conflict in the evidence, or conflicting inferences to be drawn from it and the defendant had neither objected to the allowance of plaintiff's motion nor made a motion for a new trial. Although there is no conflict in the direct testimony, relating to the concrete facts involved in the case at bar, conflicting inferences may be drawn from the testimony. The correct rule on this question is to be found in the language used in the concurring opinion of Shelby, Circuit Judge, in McCormick v. National City Bank of Waco, 142 Fed. 132, where he says, "The doctrine announced in Beutell v. Magone, 157 U. S. 154, should not be extended to cases in which there are disputed questions of fact, * * * In a case where there is such conflict in the evidence as to require it to be submitted to the jury. there is no reason why, and the Supreme Court does not hold that, a party may not ask for a peremptory instruction in hisfavor without depriving himself, if the court decides he is not entitled to it, of the right to have the jury pass on the controverted issues of fact in the case. Although both parties may ask the court to direct the verdict, if there is conflict in the evidence or conflicting inferences to be drawn from it, the court may properly submit it to the jury. * * * It is not an unusual practice to ask for peremptory instructions, and there is no valid reason why such a request should deprive a party of the constitutional right to have controverted questions of fact tried by jury. The fact that the other party after-

of the United States on the law and most affirm the judgment.
If in the opinion of this court there is any evidence in
support thereof, citing Bennett v. Bogart, 137 U. S. 488;
Dunlap Coats Section 108, in Appendix, Jones v. Lewis 54 Ga.
611 U. S. 7. This point relied on by appellant-Ibid, if the
trial judge thought that there was no evidence to the evidence,
or controlling influence in the decree then it was error
and had without objection in the discretion of plaintiffs
action not made a motion for a new trial. Although there
is no conflict in the direct testimony, relating to the
authority from Lewis involved in the main question, conflicting
inferences may be drawn from the testimony. The decree
rests on this question is in fact in the language and
in the controlling evidence of Judge, Circuit Judge, in
Kimbrough v. Hallman, 110 Ga. 27 (1900), 134 Ga. 671, where
he says, "The decision announced in Cherry v. Hunter, 107
U. S. 158, should not be extended to cases in which there
are disputed questions of fact, e.g. in a case where
there is some conflict in the evidence as to whether it
is an allowance to the jury. Again in an action ejectment
the supreme court has not held that, a party may not sue
for a prescriptive interruption in history without impeaching
himself, if the main question is in all relation to it, if
the right to have the jury come in the consideration issues
of fact in the case. Although this principle may not be a
to alone the verdict, it does be applied to the evidence
or controlling influence to be drawn from it, (Ibid. Ibid.
Ga. Appeal) remand it to the court. e.g. e.g. It is not an
unusual question in the Ga. prescriptive interruption, and there
is no doubt among the court a reasonable doubt concerning a party
of the constitutional rights in the main questions question
of fact upon it by jury. The fact that the other party affirm

wards makes the same request does not affect the question in cases where there is a conflict in the evidence, nor in cases where the party prays for other instructions if his request for a peremptory instruction is denied. * * * A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted, facts which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this no request for instructions that his opponent may ask can deprive him of the right."

But the plaintiff contends that there is nothing in the record to show that the defendant asked the trial court to submit the issues to the jury after its motion for a peremptory instruction was overruled, and that the defendant did nothing beyond requesting the court to determine the issues as questions of law, and that, therefore, it has waived its right, if any, to go to the jury upon these issues. In our opinion the record does not warrant our supporting that contention, as it might if it merely showed that the parties submitted there respective motions for peremptory instructions, and the court overruled the one submitted by the defendant and allowed the one submitted by the plaintiff, following which the defendant prayed an appeal. The record shows that after the defendant's motion had been denied, the plaintiff submitted his motion and the defendant objected to its

allowance. While the record does not disclose the grounds urged in support of the objection, we would not be warranted, in the absence of anything in the record to that effect, in assuming that the defendant merely urged that the evidence was not such as warranted the court in holding as a matter of law, that the alleged misrepresentations were immaterial or if material were true, and omitted to urge, in support of his motion, that if the court did not take the view that had been urged in support of the motion of the defendant for a peremptory instruction, then the evidence should be submitted to the jury. If we are to indulge any inference on this question, keeping in mind the state of the record, it should be that all proper reasons were urged in support of the objection of the defendant to the allowance of the plaintiff's motion. Inasmuch as the record shows that the plaintiff did interpose an objection to the allowing of that motion, and duly excepted to the ruling of the court on it and made a motion for a new trial, we are of the opinion that the defendant has not waived its right to have the jury pass upon the conflicting inferences that we believe may reasonably be drawn from this evidence. This is not like a case where a party tries his case on one theory in the trial court and presents an entirely different theory on appeal.

For the reasons stated the judgment of the Circuit Court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

[illegible]

[illegible]

[illegible]

58 - 24846

MAX SHULMAN and BERNARD SHULMAN,
co-partners doing business as
Shulman & Shulman,

Defendants in Error,

vs.

SOL. K. GRAFF,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

214 I.A. 644

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error, the defendant Graff seeks to reverse a judgment for $315.75 recovered by the plaintiffs in a fourth class action in the Municipal Court of Chicago.

Graff made a contract with one Nidetz by which they agreed to exchange certain real estate, Graff to convey premises which we shall call the Hastings street property and Nidetz to convey premises which we shall call the Evans avenue property. There were certain repairs and additions which Nidetz agreed to make to the building on the Evans avenue property and there was a Mechanic's lien suit pending which involved that property, and when Nidetz conveyed this property to Graff, the latter did not convey his Hastings street property to Nidetz, but, as provided in the aforesaid agreement between the parties he conveyed it to the plaintiff Bernard Shulman, and the agreement provided that Shulman was to hold the title to this property for four months and in

the event that Nidetz cleared the Evans avenue property of all mechanic's liens and also completed the repairs and additions referred to, Shulman was directed to convey the Hastings street property to Nidetz but if Nidetz failed to meet these conditions, Shulman was authorized to dispose of the Hastings street property for the purpose of having the conditions fulfilled and turn whatever balance might remain over to Nidetz. Plaintiff Bernard Shulman testified that when Graff and Nidetz came together in his office to sign up this agreement, "I found I would have to begin action, for the deal couldn't be closed because there was $300 more cash required which nobody there was willing to furnish;" that he then offered to advance the $300 so as to have the deal closed; and that, in order to protect himself, he had Nidetz and his wife sign a letter to him stating, "that the premises that you have this day taken title to, in accordance with agreement of even date by the undersigned and Sol K. Graff, * * * you shall retain title to * * * until note of even date herewith in the sum of Three Hundred ($300.00) Dollars executed by ourselves and delivered to Albert Rothbaum shall be fully paid." Shulman testified further that this $300 note represented the commission paid to Rothbaum who was a real estate man, for bringing Graff and Nidetz together and that he gave his check for $300 to an agent of Rothbaum's in exchange for the note at the time the deal between Nidetz and Graff was closed. The note was signed by Nidetz and

endorsed by Rathbaum and was a judgment note.

Later on, Nidetz defaulted in his agreement to clear the Evans avenue property of mechanic's liens and complete the repairs and additions to it, and he seems to have left the City of Chicago. Graff then applied to Shulman for a reconveyance of the Hastings street property to him, but Shulman reminded him of the authority he held from Nidetz to retain title to the property until the $300 note was paid. Graff could not take up the note at that time, so, in consideration of the conveyance of the Hastings street property back to him, he executed the agreement on which this action is based. By this document Graff agreed to protect Shulman against any damages as a result of the conveyance of the Hasting street property by Shulman to him. He also agreed to pay Shulman $300 within four months being the amount advanced by Shulman on the note above referred to, "it being understood, however, that you are to proceed with the suit now pending in the Circuit Court of Cook County, against the makers of said note and try to collect the same and also to use all means possible against the endorsers for the collection of said amount, and in the event that the said amount shall be collected from defendants or any other persons, the amount collected less expenses to be returned to me." Shulman reconveyed the Hastings street property to Graff's wife at his request. He had previously taken judgment on the note, but has done nothing further to realize on it. Nidetz the maker of the note seems to have

departed for parts unknown. Rothbaum now resides in Michigan but returned to Chicago upon one occasion at Shulman's request to testify in another case involving Graff. In our opinion the testimony clearly establishes the facts as thus outlined. There was testimony supporting the contention that at the time Graff signed the agreement sued upon he said he would pay Shulman the $300 involved as he thought Shulman ought not to lose anything out of his connection with the transactions.

On this state of facts the plaintiff in recovering his judgment against the defendant, is merely being made whole for the money he advanced as a favor or convenience to him at the time his agreement with Sidetz was closed. Defendant contends that plaintiff should not be permitted to recover in his action on the agreement here sued upon because he has not carried out the conditions precedent which are therein provided. The conditions referred to are not made precedent, by the terms of the agreement wherein the defendant agrees to pay plaintiff the $300, "within four months" and nothing whatever is said as to when plaintiff is "to proceed with the suit on the note" or "use all means possible against the endorsers." Indeed the agreement contains terms which would seem to indicate that the defendant, when executing it, had it in mind that these efforts were not to be put forth before he paid the $300, for the agreement provides that in the event that the amount of the note shall be collected, the amount so collected less ex-

penses, shall be "returned" to defendant.

The defendant urges further that the judgment is erroneous because it is in favor of a partnership consisting of Bernard and Max Shulman whereas the contract sued upon is with Bernard individually and the record fails to show any assignment of the claim under the contract to the partnership. This contention is not tenable. While the contract is with one of the partners individually, it is shown by the record to have been incident to partnership business and that it was the property of the partnership. Bernard Shulman testified that he was a member of the firm of Shulman & Shulman, the plaintiffs and an attorney and that he was asked by defendant to represent him in this real estate transaction. Moreover this point was not raised by defendant in his affidavit of merits nor in any other way in the trial court.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

78 - 24375

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

JOHN MULAC,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 644

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff in error, Mulac, has sued out this writ of error to reverse a judgment of the Municipal Court of Chicago by which he was adjudged guilty of larceny and sentenced to one year in the House of Correction and to pay a fine of $50.00 and costs.

The only point urged by the plaintiff in error in support of his contention that the judgment should be reversed, is that the record contains a statement to the effect that the cause having been submitted to the Court for its decision, the people being represented by the States Attorney and the defendant being present and represented by counsel and the court being fully advised in the premises, found the defendant guilty in manner and form as charged in the information, following which, the judgment was pronounced by the court as set forth, but the record does not show that the plaintiff in error executed any waiver of trial by jury.

The statement referred to does appear in the record but preceding it the record contains another statement setting forth that, the cause being reached for trial, it was ordered that a jury come and thereupon there came a jury of twelve lawful men, towit: (Here follows the names of the twelve jurors) and further that, the jury being impaneled, the people being represented by the States Attorney and the defendant being present and represented by counsel, the jury heard the testimony of the witnesses and the arguments of counsel and the instructions of the court and retired in charge of a sworn officer of the court to consider their verdict. There further appears in the record the verdict of the jury as follows: "We, the Jury, find the defendant, John Hulac, guilty of larceny in manner and form as charged in the information and we further find from the evidence the value of the stolen goods to be TEN AND NO/100 ($10.00) Dollars."

There can be no doubt therefore that the judgment complained of was based upon a proper verdict by a jury, and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

79 - 24379

ALBERT LORENZ and ARTHUR LORENZ, co-partners as Lorenz Bros., Defendants in Error, vs. ESTHER LEIBSOHN, Plaintiff in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

214 I.A. 645

MR. JUSTICE THOMSON delivered the opinion of the court.

The Lorenz brothers brought this action against the defendant Esther Leibsohn on a promissory note signed by her for the sum of $1,000. Judgment by confession was obtained for the sum of $1,200 including $100 as a reasonable attorney's fee. Subsequently the defendant obtained leave to defend, the judgment to stand as security. She filed a plea of the general issue and also one setting up payment of the note. Before the cause was reached on the trial calendar it was placed upon the short cause calendar in the regular way and shortly thereafter was reached for trial. When so reached for trial the defendant requested a continuance, basing the request on an affidavit setting up that one Mass, a material witness, was in Detroit and not available as a witness and further setting up the facts to which he would testify if he were present. The motion for a continuance was overruled and the cause proceeded to trial before a jury. The verdict found the issues for the plaintiff and assessed their damages at the sum of $1,160. A

motion for a new trial was overruled and the court entered an order confirming the original judgment in the sum of $1,200, to reverse which the defendant has sued out this writ of error.

The evidence shows that the defendant was erecting a building in the City of Chicago, on which Mass was the general contractor. Lorenz Brothers had a sub-contract on the building, their work amounting to about $336. As the work on the building progressed the defendant gave Mass several notes among which was the one in question. Lorenz Brothers were doing work for Mass on other buildings and had a running account with him on which he owed them a considerable amount. Mass endorsed and delivered the $1,000 note in question, to Lorenz Brothers, to apply on his indebtedness to them. He also paid them different amounts from time to time and when Lorenz Brothers received such amounts they would ask him on what job the payments were to apply and they would credit the amounts on such jobs as he would designate. The plaintiff's testimony was to the effect that Mass never designated any payments for application on the defendant's note. One of the plaintiffs, while on the stand, testified to receiving a payment of $1,000 from Mass after receiving this note and he was asked whether or not he had waived his lien on the defendant's building at the time he received that payment. Objection to that question was sustained. He was then asked whether he had told Mass at that time that he would return the note to him but could not do so then as he had it up as collateral on a loan, and he replied that he may have said something to that effect but could not rem-

ember if he did. The testimony submitted on behalf of the defendant was to the effect that she had paid Mass the amount due on this note and it was admitted that if Mass were present as a witness he would testify that he had a running account with the plaintiffs; that the defendant had given him this note in part payment on her building, on which he was the general contractor and that he endorsed the note and gave it to the plaintiffs, and that thereafter he paid the plaintiffs $1,000 in full payment of the note and demanded its surrender and stated at that time that this $1,000 payment was money that had come from the defendant to be applied in payment of the note and that the plaintiffs stated that they had deposited the note, with other papers as a security for a loan they had made and that therefore they could not surrender the note at that time but that they would take up their loan and get the note and surrender it within a few days, but that they have not done so although the request for its surrender has been repeated several times.

It will be seen that the testimony to the effect that the defendant had paid Mass the amount due on this note is not denied, but there is direct conflict in the evidence as to whether Mass had ever paid the amount due on the note to the plaintiffs his affidavit being to the effect that he did and the testimony of the only witness on behalf of the plaintiffs being to the effect that he did not.

When the plaintiff Lorenz was on the witness stand and testified to having received the sum of $1,000.00 from Mass about the time the defendant claimed she had paid

that amount to Mass in payment of her note and he, (Lorenz) was asked whether it was not a fact that at the time he received the payment in question from Mass he had waived his lien on the defendant's building, the objection interposed by the plaintiffs should have been overruled. In our opinion this evidence was material and had some bearing on the question of whether or not the payment of $1,000.00 from Mass to the plaintiffs at the time in question was, as claimed by Mass, designated as being in payment of the defendant's note which the plaintiffs then held.

The court gave the jury an instruction reading as follows: "The court instructs the jury that the maker of the note assigned before maturity cannot claim payment thereof unless the assignee had notice before the assignment or that the maker had possession of the note." The meaning of this instruction is rather obscure and we are of the opinion that it may have proven very misleading to the jury. The question referred to in the instruction was in no way at issue in this case. The defendant did not claim that she had paid the note to Mass before he endorsed and delivered it to the plaintiffs but rather that she made such payment to Mass after he had so endorsed and delivered it to the plaintiffs and that he, in turn, had paid the money to the plaintiffs and that they had received the money in payment of the note from him and had promised to deliver the note as soon as they could get hold of it. This defense did not in any way involve the question of whether the plaintiffs "had notice before assignment" which is the matter purported to be

covered by the instruction.

It was entirely proper for the court to allow the original judgment to stand although that was a judgment for $1200.00 and the verdict was for only $1160.00. The form of the verdict, being for the plaintiff, should have been,"We the jury, find the issues for the plaintiffs." The assessment of damages in the verdict as returned by the jury was surplusage, and the court did not err in disregarding it. Lyman v. Kline, 128 Ill. App. 497, 506. The defendant does not complain of the allowance for attorneys fees which was included in the judgment as originally entered.

Because of the error in the admission of evidence and the giving of the instruction to which we have referred, the judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

assessed by the industrialist.

It was relatively proper for the court to allow in evidence the attached judgment in which plaintiff was a judgment creditor. The (1955.11) and the execution was the only lien. The form of the judgment, being for the plaintiff, "shall be deemed, for the day, find the issues for the plaintiff." The assessment of damages is then treated as returned by the jury was sufficiency, and the court was in disagreement in. Lemmon v. Fisher, 328 Ill. 187, 189. The authorities have not specified of the action under for determining there which was introduced the judgment on verifiably authority.

Because of the error in the admission of evidence and the finding of the industrialist is which no more authority, the judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

Reversed and remanded.

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424 - 24777.

PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. EDWARD W. MORRISON, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 645

MR. JUSTICE THOMPSON delivered the opinion of the court.

This is an appeal by the respondent, Edward W. Morrison, from a judgment of the Circuit Court by which he was pronounced a spendthrift and by reason of such condition, incapable of managing and caring for his estate and a conservator thereof, appointed. A petition for the appointment of a conservator for the estate of the respondent was filed in the Probate Court of Cook County by two of his cousins, alleging that he was a feeble minded person and a spendthrift. That petition was subsequently amended and still later the petitioners filed their second amended petition alleging that the respondent is a feeble minded or distracted person and a spendthrift and wholly incapable of managing his estate or transacting business and that by reason of his unsoundness of mind he is incapable of managing and caring for his estate and that he so spends, wastes and lessens his estate as to expose himself to want and suffering.

A hearing was had in the Probate Court before a jury and the jury found that the respondent was a feeble

minded person and that he was a spendthrift. From the judgment which followed, the respondent appealed to the Circuit Court where a trial of the issues was had de novo, resulting in the return of two verdicts or findings by the jury one being to the effect that the respondent "is not a feeble minded or distracted person and is not incapable, by reason of unsoundness of mind of transacting ordinary business affairs," and another finding that the respondent "is a spendthrift * * * and that he has an estate and that he so spends, wastes and lessens his estate as to expose himself to want or suffering." Thereafter the court entered judgment in which it was adjudged that the respondent "is not a feeble minded or distracted person and is not incapable, by reason of unsoundness of mind, of transacting ordinary business affairs", and that he "is a spendthrift and by reason of such condition is incapable of managing and caring for his own estate and * * * it is ordered * * * that a conservator be appointed," and the court proceeded to appoint the Standard Trust & Savings Bank as conservator of the respondent's estate.

It is provided by sec. 1 of ch. 86 of our statutes that when any person having any estate shall be a feeble minded person, who by reason of unsoundness of mind, is incapable of managing and caring for his own estate, or when any person having any estate shall be a spendthrift who is alleged so to spend, waste or lessen his estate as to expose himself or his family to want or suffering, the County Court shall proceed to ascertain whether such person be a feeble minded person who by reason of unsoundness of mind is incapable of managing and caring for his own estate, or is a spendthrift "as aforesaid". Section 2 of the same chapter

provides for the issue of process and the impaneling of a jury and then provides that, if any person be found a feeble minded person or spendthrift, "and by reason of such condition incapable of managing or caring for his own estate," it shall be the duty of the court to appoint a conservator.

It is our opinion, that under a proper construction of these sections a spendthrift who "so spends, wastes and lessens his estate as to expose himself to want or suffering" is to be considered "by reason of such condition incapable of managing and caring for his estate." In construing the statute we must consider all parts of it together, and as to the two sections referred to, the language used in each of them should be considered in connection with the language used in the other, (Krome v. Halbert, 263 Ill. 172) and an application for the appointment of a conservator, on the allegation that the respondent is a spendthrift, the finding of a jury to the effect that said respondent has an estate and that he so spends, wastes and lessens his estate as to expose himself to want or suffering, is sufficient in all respects, and that on such a verdict or finding by the jury the court may properly enter an order or judgment and therein adjudge said respondent a spendthrift and that by reason of such condition he is incapable of managing and caring for his own estate. It is not necessary, as alleged by the respondent, that the verdict itself shall contain the latter phrase. Nor is it necessary, as the respondent further contends, that the verdict contain a finding as to the value and nature of the estate. There is no such requirement in the statute.

The respondent contends further that the finding of the jury to the effect that the respondent is not a feeble minded or distracted person nullified the verdict finding that he is a spendthrift and precluded the court from appointing a conservator, the contention being that if the respondent is not incapable, by reason of unsoundness of mind, of transacting ordinary business affairs, he cannot be, within the meaning of the statute, a spendthrift, and by reason of such condition incapable of managing and caring for his own estate. This contention is not tenable. As the court said in Bishop v. Welch, 149 Ill. App. 491, at page 498:

> "There is a clear distinction between a proceeding instituted to adjudge a person a lunatic or insane and a proceeding instituted to adjudge a person a spendthrift. The former relates to an inquiry and determination as to the condition of mind of the patient without special reference to his property, while the latter relates to an inquiry and determination as to certain habits of the person involved regarding his disposition to spend, waste or lessen his estate."

It may well be that one may not be incapable of managing and caring for his own estate because he is feeble minded or by reason of unsoundness of mind, and at the same time he may be a spendthrift and so spend, waste or lessen his estate as to expose himself or his family to want or suffering and for that reason incapable of managing or caring for his own estate. The tests of whether a person is feeble minded or is a spendthrift are not the same, but if he fails to meet either test he is to be considered, under the provisions of the statute, "incapable of managing and caring for his own estate." Although one may be found to be able to transact ordinary business affairs and thus meet the test as to soundness of mind, he

may still be found to be a man of such habits and disposition as to involve such a spending, wasting or lessening of his estate as to expose himself to want or suffering and if so, notwithstanding the fact that he has met the test as to the soundness of his mind, he has failed to meet the test as to being a spendthrift and when a finding is made by a jury to this effect, he may be adjudged, "by reason of such condition incapable of managing and caring for his own estate," and a conservator may be appointed.

In the trial of this case there were two distinct issues presented, one involving the question of whether the respondent was a spendthrift and the other involving the question of whether he was a feeble minded or distracted person and it was quite proper for the jury to return a verdict or finding as to each of those issues and for the court to pronounce judgment accordingly. Furthermore respondent is not in a position to urge in this court that section 79 of chapter 110 of our statutes precludes the returning of two such verdicts in the same trial, for the record discloses that the jury first returned a verdict as to the spendthrift issue only, whereupon counsel for the respective parties advised the court that it was their desire that all the issues in the case be disposed of by the jury, following which the court directed the jury to retire for further deliberation, which they did and upon again returning into court they submitted the two verdicts now shown in the record. The respondent, having invited and requested the disposition of both issues by the jury, he cannot now complain of their action and it is immaterial whether the disposition by the jury of the two issues pre-

sented to them was in the form of two separate findings or verdicts, or in one.

The respondent further contends that the trial court erred in telling the jury, by instructions submitted by the petitioners, that it was for them to ascertain whether respondent is a spendthrift who spends, wastes or lessens his estate so as to expose himself to want or suffering and in refusing certain instructions, which he submitted, in substance to the effect that in order to find that he was a spendthrift, as alleged in the petition, they must believe from the evidence not only that said respondent is a spendthrift but that also that by reason of such condition he is incapable of managing and caring for his own estate. We are of the opinion that the trial court did not err in the matter of the instructions, and it should be said further that the respondent himself submitted instructions on these issues similar to those submitted by the petitioners and given by the court. In instruction 15 submitted by the respondent it was stated that he could only be deprived of the management of his own estate, when , from the preponderance of the evidence the jury found he was a feeble minded person and by reason of his unsoundness of mind incapable of managing and caring for his own estate, or a "spendthrift" and by reason of such condition "spends, wastes and lessens his estate so as to expose himself to want and become a burden and a charge and an expense on the community." Instruction 16 submitted by the respondent was drawn on the same theory. Further, it should be said that after submitting such instructions the respondent is not in a position to complain as to the form of the verdict or finding returned by the jury on the spendthrift issue, it being in the

[illegible]

The [illegible] [illegible] [illegible]

form referred to in his own instructions.

The respondent finally contends that the judgment of the trial court should be reversed because the appointment of the Standard Trust & Savings Bank was void, that corporation being a banking corporation, and as respondent alleges, not eligible under sec. 5 art. 11, of our state constitution, to hold the office and perform the duties imposed by law upon a conservator. As to this point we would say, first; that there is not sufficient evidence preserved in the record to show that the Standard Trust & Savings Bank is not such a corporation as may properly be appointed conservator, under the provisions of our constitution and statutes; and second, even though the record did contain sufficient to uphold the contention of the respondent in this regard, the judgment of the trial court would not therefore be void, nor should it be reversed for such a reason. The judgment appealed from remands this cause to the Probate Court for further proceedings. If the Standard Trust & Savings Bank is not such a corporation as can properly be appointed a conservator, the Probate Court has ample power, under sec. 32 of ch. 86 of our statutes, to remove the conservator and name another.

For the reasons stated the judgment of the Circuit Court is affirmed.

AFFIRMED.

9-1919

348a

Gen. No. 6772 OCTOBER TERM A. D. 1917. Ag. No. 13.

E. O. MAYER AND J. F. SHOUP, Partners, etc., Defendants in Error,

vs.

GENNETTIE MANLEY AND GRANVILLE L. MANLEY, Plaintiffs in Error.

Writ of Error to the Circuit Court of Logan County.

214 I.A. 645

GRAVES, P. J.

Defendant in error filed a bill to forclose a real estate mortgage given by plaintiffs in error on a twenty acre tract of land that was at the time the mortgage was given owned by Granville L. Manley, to secure a note for $1000 executed by the said Granville L. Manley and Gennettie Manley, His wife. They answered the bill alleging that the note in question had been paid and denying any further obligation thereon. They also filed a cross-bill charging that plaintiffs in error had since the maturity of the note sued on conveyed to one W. H. Bryson to whom the note and mortgage in question had been given, and who at that time was owner thereof, one-half of the mortgaged premises in consideration of the amount due on the note and had thereby entirely paid and cancelled the obligation represented thereby and praying for the cancellation of said note and mortgage. Defendants in error answered the cross-bill and denied all the material allegations therein and the two bills were referred to a Master in Chancery to take proofs and report the same together with his conclusions of law and fact.

The Master made his report finding that on January 20, 1906 there was due on the note sued on $850: that the note and mortgage were on Sept. 1, 1913, assigned to defendants in error: that at the time of the report there was due on said note the sum of $1449.46 as principal and interest and recommends a decree of foreclosure to make that amount. Exceptions were interposed to this report and heard. Pending a disposition of these exceptions, the master apparantely of his own motion obtained leave of court to amend and did amend his find-

ings of fact. The court then overruled the exceptions of plaintiffs in error theretofore made and heard, and entered a decree in which the court finds the indebtedness to be $1493.59 and orders a foreclosure and sale of the premises described in the bill and dismissed the cross-bill for want of equity. Plaintiffs in error claim the decree is in many respects contrary to the evidence. Defendants in error call attention to the rule that the findings of the master should not be set aside unless they are manifestly contrary to the evidence, which is undoubtedly correct. There is, however, nothing sacred about a master's findings, and if it is manifest that they are contrary to the evidence, a decree based on them will be reversed. An impartial examination of the master's findings in this case and the evidence on which it is based convinces us that he has misapprehended the force and effect of some of the evidence reported by him, and that his findings are manifestly contrary to the weight of the evidence.

The master first finds that on Nov. 13, 1897 Granville and Gennettie Manley were indebted to William H. Bryson in the sum of $1000 and that they then executed the note and mortgage sued on etc.

The proof fails to show that Gennettie Manley owed Bryson anything, although it does show she signed the note sued on, with her husband. The proof shows as defendant in error has pointed out in his argument that Granville Manley owed Bryson $1250 at that time instead of $1000 as found by the Master.

The second finding of the master is that on October 18, 1902 Gennettie Manley became the owner of the premises in question by mesne conveyances. This finding is supported by the evidence.

The third finding is that on January 13, 1903 a **partial** settlement was made between the Manleys and Bryson whereby the Manleys were to deed to Bryson ten acres of the mortgaged premises and have credit for $1000 on their **said mortgage** indebtedness to Bryson. This finding was afterwards amended by striking out the words "said mortgage." This did not change the meaning of the finding however for the proof shows that the mortgage indebtedness referred to was the only indebtedness they jointly owed Bryson. Gran-

ville Manley owed more but his wife did not.

The evidence further shows that while the consideration named in the deed was $1000, the actual consideration for it was the liquidation of $1070 of Manley's obligations to Bryson, as the master found in his next finding, and the cancellation and surrender of the $1000

note sued on, together with the mortgage given to secure it.

The fourth finding of the master is that the Manleys executed a deed for the ten acre tract and delivered is to Bryson whereby the Manleys became entitled to a credit of $1070 on their "said indebtedness," and that the mortgage remained a valid lien on the balance of the premises for the balance of the debt owed by the Manleys to Bryson.

This finding of the master is in conflict with the third finding above referred to in that the amount for which the Manleys are found to be entitled to credit on their debts in the third finding is said to be $1000 and in the fourth finding it is said to be $1070. The evidence shows that the amount named in the fourth finding is correct. The weight of the evidence also shows that Granville L. Manley at that time owed to Bryson about $700, to be exact, $635.38 as computed by defendants in error in their argument, in addition to the $1070 to be satisfied by the conveyance of the ten acre tract to Bryson. Bryson himself testifies as to this balance "There was between $600 and $700 due me over the $1000. We called it $700." The weight of the testimony further shows that the $1000 note and the mortgage given to secure it were to be cancelled and surrendered to the Manleys and a new note or notes and a new mortgage were to be executed by the Manleys for the balance of about $700 which mortgage was to cover a part only of the ten acre tract not conveyed to Bryson, there being reserved from that tract the portion thereof on which the Manley residence rested; that

the deed to the said ten acres, from the Manleys to Bryson and a new note or notes and a mortgage to secure the same were all executed and placed in the hands of one Horn, the justice of the peace who drew

them, in escrow to be delivered to Bryson upon his delivering the original $1000 note and the mortgage given to secure it to the said justice of the peace, and that Bryson by a subterfuge obtained possession of the deed on his promise to return the same to Horn; that instead of returning it he had it recorded and never did deliver up the $1000 note and mortgage to Horn or to the Manleys.

The fifth finding of the master is that on January 20, 1906, there was a settlement between Bryson and Granville L. Manley at which time it was agreed that there was a balance due on the $1000 note and mortgage sued on of $850.

Granville L. Manley, his wife Gennettie Manley and J. A. Horn, the justice of the peace who heard the settlement made, all testify that on January 13, 1903 the $1000 note was paid by the conveyance of ten acres of land, and Bryson himself testified in answer to a question propounded by his own attorney that after credit was given on January 13, 1903 on the $1000 note for the price of the ten acre tract conveyed to him there was $70 still due, and when then asked the question "Over and above the amount", he answered "Over and above the credit he got for the land. At the time it was figured up in Mr. Horn's office." And in another place he testified—"I was to give Manley credit for $1000 for the land and $70 for the use of it, making $1070.

This testimony of Bryson exactly corresponds with that of the two Manleys and Horn and is undoubtedly true, although in answers to improper, leading and suggestive questions, he finally said there was $735.38 due on the mortgage on January 13, 1903. A careful scrutiny of all his testimony on this subject convinces us that when he said there was $735.38 still due on the mortgage he was testifying to the balance found due on all accounts including the $1000 note as well as other notes, and at that, he has it too high by exactly $100, for it is now agreed on all hands that $635.38 was such balance at that time and it was for this amount the Manleys say they were to give the new notes and mortgage.

There is a memorandum signed by Manley and

Bryson on the back of the $1000 note to the effect that there was on January 1906 $850 still due on the note. Manley testified that the signature to this memorandum was his but that the memorandum was not in his handwriting; that while in the office of one Tomilson who was acting as attorney for Bryson the amount of his total indebtedness was figured up and found to be $850 and two statements in writing were made of that fact one of which was given him and one of which was retained for Bryson, but that the settlement had nothing to do with the note or the amount due on it, and that he did not know when he signed what he supposed was a memorandum that it was written on the note. Manley was asked by Bryson's attorney to produce his copy of the memorandum of that transaction, and he did so, but it is quite significant that they did not offer it in

evidence, and we do not know its contents. The finding of the master that it was agreed in 1906 that there was $850 still due on the $1000 note is like the others mentioned clearly against the manifest weight of the evidence.

While there is some evidence offered by Bryson contrary to some of the conclusions of fact, we have reached, the manifest weight of all the evidence shows that when the ten acres were deeded by the Manleys to Bryson it was agreed that the note sued on was to be satisfied thereby and that the said note and the mortgage given to secure it should be surrendered to the Manleys or to Horn for them. The fact that Bryson possessed himself of the deed and recorded it was an acceptance by him of it and the title to the premises thereby conveyed and binds him by the terms upon which it was made. If he did not get the new note and the mortgage to secure the balance of other indebtedness owing to him by Manley it is his own fault. The proof shows the same were executed and left with Horn for him.

The decree of the Circuit Court is reversed with a finding of fact that the note sued on by defendant in error was fully paid and satisfied by the deed dated October 5, 1903 from plaintiffs in error to W. H. Bryson and the cause is remanded to the Circuit Court with directions to dismiss the bill of defendants in error and grant the prayer of the cross-bill and direct the defendants in the cross-bill to surrender the notes and mortgage sued on to be cancelled.

Reversed and Remanded with directions.

549a

Gen. No. 6790. OCTOBER TERM A. D. 1917. Ag. No. 25.

H. L. MILLER and ANNA MILLER, Partners, doing busines as L. F. Miller and Son,
Defendants in Error,

vs.

WILLIAM J. JACKSON, Receiver of the Chicago & Eastern Illinois Railroad Company,
Plaintiff in Error.

Error to the Circuit Court of Vermilion County.

GRAVES, P. J.

214 I.A. 646

This is a suit in trespass on the case to recover for damages to 160 barrels of apples and 384 bushels of peaches resulting from the negligence of plaintiff in error while the same were in his possession for transportation between points in this state. There are two counts in the amended declaration. It is charged in the first count that plaintiff in error as receiver of the C. & E. I. R. R. Co. so negligently and carelessly handled said 160 barrels of apples in shipment that the heads of several of the barrels in which the apples were contained were knocked out and the apples were bruised and injured to the extent of $25. It is charged in the second count that plaintiff in error failed to keep the car in which the peaches were being transported on its lines in Illinois propely iced, and to keep it in such condition as to properly protect the peaches whereby about one-half of them rotted and thereby were damaged in value to the extent of $250. Plaintiff in error filed a plea of the general issue and several special pleas. In view of the fact that defendants in error at the trial disclaimed and still disclaim any attempt to recover under the provisions of the Carmack Amendment, and base their right to recover solely on

the negligence of plaintiff in error while the goods were in his possesion for transportation between points in Illinois, no time need be given to the consideration of the special pleas. Defendants in error recovered a judgment of $223.50.

In order to be entitled to recover in this case it was necessary for defendants in error to allege and prove that the damage complained of was caused by

the negligence of plaintiff in error. **Pennington v. Grand Trunk Ry. Co.** 277 Ill. 39. Notwithstanding what has heretofore been said by some of the Appellate Courts of this State to the contrary, the Supreme Court in the Pennington case has settled, upon sound reason, that the rule prevailing where suits are brought under the Carmack Amendment to the Hepburn Act, to the effect that when perishable goods are delivered to the initial carrier in good condition the intermediate or final carrier in whose hands the goods are found in a damaged condition will be presumed to have received them in good condition, does not prevail where suit is brought against a particular carrier to recover on its common law liability. One suffering loss by damage to goods in transit in an interstate shipment has his election whether he will bring his action in such a way as to be able to avail himself of the presumption referred to or not. Defendant in error in this case has chosen to proceed in the manner that excludes the presumption.

We have searched this record in vain for proof that plaintiff in error received the fruit in question in good condition. On the

contrary there is considerable evidence strongly tending to show that the peaches in question were in bad condition before they were received by plaintiff in error.

The judgment of the Circuit Court is reversed and the cause is remanded.

Reversed and Remanded.

550a

Gen. No. 6831. October TERM, A. D. 1918. Ag. No. 71.

H. M. MURRAY, Conservator of Alvina Katz,
Appellant,

vs.

G. C. LAW, Appellee.

Appeal from the Circuit Court of McLean County.

GRAVES, P. J.

214 I.A. 646

This suit was brought to recover damages for the breach of numerous covenants in a written lease of farm lands from March 1, 1914, to March 1, 1917. Appellant sues as the conservator of a distracted person. Appellee filed among other pleas a plea of tender of $68.40 which he averred was in full for oats sold during the first year of his tenancy. He denies all other breaches of the covenants of his lease charged against him. The case was tried by a jury which found the issues for the plaintiff, the appellant here, and assessed his damages at the amount admitted to be due by the plea of tender of $68.40 and against appellant for costs. The plaintiff appeals.

An examination of the record in this case convinces us beyond the possibiliy of mistake that the verdict and judgment are manifestly contrary not only to the weight of the evidence, but contrary to the testimony of appellee himself. The verdict for $68.40 corresponds exactly in amount to the averments in the plea of tender. Appellee while a witness in this case in his own behalf both on direct and cross examination testified that during the first year of his tenancy, which was during the farming season of 1914, he raised on the rented premises 684 bushels of oats which he sold during that season for 45 cents per bushel, that one-half of those oats belonged to his landlord. One-half

of 684 bushels is 342 bushels, which at 45 cents per bushel amounted to $153.90 or $85.90 more than the verdict.

By the terms of the lease appellant was to have one-half of the corn raised by appellee on the premises. The corroborated and uncontradicted testimony of one of the men who harvested part of the corn in 1915 is that during the 6 or 7 days he was working there at

that time he husked and put in appellee's crib six or seven rows of corn to four rows husked and put in appellant's crib, that he worked until ten o'clock in the forenoon husking corn what was given to appellant and the rest of the day until dark he worked husking corn that went into appellee's crib. The testimony of that witness and another who had observed the comparative size of the loads of corn given to the respective parties places the difference at from 12 to 18 bushels a day in favor of appellee. Taking the average of these estimates or 15 bushels per day for 6 days would be 90 bushels and for 7 days would be 105 bushels that this one witness knew appellee had had of appellant's corn during one year. The value of this corn was variously placed at from 68 cents to $1.00 per bushel or a total of from $61.20 to $105.

These two items alone show a debt due to appellant from appellee nearly four times as great as the judgment rendered. There are other breaches of the lease clearly proven by the evidnece such as removing the straw, selling the stalks and permitting live-stock belonging to outsiders to run on the premises all of which was in violation of the covenants of the lease, but there is no proof in the record from which the extent of the damages arising therefrom can be computed.

Even if there was due appellant only $68.40 as the jury found, still the judgment against appellant for costs is erroneous. The plea of tender was not supported by the proof. Appellee testified that he went to the office of appellant and "was going to write him a check" but that appellant said he "needn't to mind it he was in no hurry." All this was denied by appellant in toto, but if true it does not even approximate proof of tender.

There was no error committed by the court in instructing the jury of which appellant can complain. The series of instructions were as favorable to appellant as the law will warrant and the fifth given instruction was too favorable to him in that it left to the jury to estimate the damages from the evidence in the case in **connection with their own knowledge, observation and experience in the affairs of life.**

For the reasons given the judgment is reversed and the cause is remanded to the Circuit Court.

Reversed and Remanded.

551a

Gen. No. 6920. APRIL TERM A. D. 1918. Ag. No. 65

BROADWAY BANK OF ST. LOUIS, MISSOURI,
Appellee,

vs.

McGEE CREEK LEVEE AND DRAINAGE
DISTRICT, Appellant.

Appeal from the Circuit Court of Pike County.

GRAVES, P. J.

214 I.A. 646

A demurrer to the bill on which the decree now appealed from is based was sustained by the Circuit Court and the bill was dismissed for want of equity. On appeal from that order this court held the bill to be good, reversed the order sustaining the demurrer and remanded the case with directions to overrule the demurrer. Pursuant to that mandate of this court the Circuit Court overruled the demurrer and issue being joined, in due time heard the case, found that all the material averments in the bill had been proven and entered a decree granting the relief prayed for. This appeal brings this final decree before us for review. The findings of this court in this case when it was here before are binding on us now. The opinion of this court on the former appeal of this case is reported in Vol. 204 Ill. App. 592.

The bill alleges and the proof shows that appellant is a drainage district embracing about 11,000 acres of land organized for the purpose of constructing drains, ditches and levees for the redemption of low lands in order to render the same fit for cultivation; that to pay for constructing these improvements an original assessment of $123,688.93 was levied against the lands in the

district; that bonds were issued pursuant to the provisions of the statute to the amount of $111,000, which is approximately equal to ninety per cent of that assessment; that it was ascertained that the work could not be completed with the money so raised and an additional assessment was levied for $62,720.00; that on the hearing of the petition for the levying of the additional assessment the court entered an order by the terms of whcih $12,688.93 of the original assessment was remitted or abated; that being the amount of that assess-

extent void and that the portion of said original assessment was a lien on the lands of the district and that the warrant in question shall be and is a lien on what shall remain of both the original and additional assessments after the bonds issued against them respectively have been paid and retired. Appellant complains of that decree only in so far as it makes the warrant a lien on the balance of the original assessment that was sought to be remitted or abated by the County Court at the time the additional assessment was authorized.

The relief granted is no broader than the language of the warrant made the basis of this suit. The warrant directs the treasurer of the district to pay" * * * seven thousand dollars out of any moneys now in the treasury of said district and out of any moneys from **any** assessment **now levied** not otherwise appropriated * * * * ". The amended bill that was before us on the last appeal contained the following averment:—

"That thereupon and thereafter, the commissioners of McGee Creek Levee and Drainage District filed a petition under and by virtue of Section 38 of the Levee Act, for leave to borrow a sum of money not exceding the sum of $7,000.00 against the two special assessment hereinbefore referred to, **meaning the original assessment, and the First additional assessment,** subject to the **two bond issues** hereinbefore referred to, and that upon the hearing of said petition the County Court of Pike County entered an order directing the commissioners of said district to borrow a sum of money not exceeding the sum of $7,000.00 against the **two special assessments hereinbefore referred to, meaning the original assessment and the first additional assessment, subject to the two bond issues hereinbefore referred to."**

The truth of all of these averments was admitted by the demurrer, the sustaining of which was the occasion of the last appeal. After the order sustaining the demurrer had been reversed by this court and the cause had been remanded to and redocketed in the Circuit Court, appellant filed its answer to the bill and expressly denied the truth of all of the averments quoted above, and proofs of the matters at issue were introduced. An examination of the record discloses that the proof does not sustain those averments. On the contrary it appears that the petition of the Commissioners for leave to borrow the sum of $7,000.00 under the provisions of Section 38 of the Levee Act asked for authority to issue warrants in a sum not exceeding $7,000.00. "Against any funds now on hands in the

treasury of said district and against said last special assessment in excess o f 90 per cent thereof."

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and that the order entered by the County Court in that regard was in part

"It is therefore ordered by the Court that said commissioners be and they are hereby authorized to issue warrants against any funds now in the treasury of said district and against **said last** special assessment in excess of 90 per cent therof."

By the "last special assessment" referred to in the quotations just made is meant the second or additional assessment and not the original assessment, but appellee argues that the words "Any funds now in the treasury of said district" are broad enough to include by implication the balance of the original assessment over and above the 90 per cent bond issue. We cannot agree with that contention. It is clear that no part of the original assessment was intentionally included in the source from which funds could come, out of which the proposed warrant could be paid. In the first place the language employed expressly limits the source of such funds to the "last special assessments". Besides that the same court in the same case had already entered an order in terms remitting and abating all of the original assessment above 90 per cent thereof and there is nothing in this record indicating that any suggestion had at that time been made in that court or elsewhere that the order of abatement was not binding. In this connection it is interesting to note that when counsel for appellant was preparing the amended bill in this case, and the decree based thereon, they found no difficulty in expressing themselves in terms that unmistakably include both assessments. They there say "against the two special assessments herinbefore referred to, meaning the original assessment and the first additional assessment." We are forced to the conclusion that the idea of claiming a lien on any part of the

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original assessment for the payment of the warrant in question was a thought that came to appellant even after the filing ofthe bill in this case. In determining whether the part of the original assessment to which the order of abatement was addressed, was inadvertantly included, it must not be forgot-

ten that the proceeding then pending by which the commissioners sought permission to borrow the $7,000.00 for which the warrant in question was issued was purely statutory and that the right to borrow that money must be obtained, if obtained at all, by an order of court which must be understood to be, and in fact was, a limitation as well as a grant of power. "To create an indebtedness the means provided by the statute are the only means that can be resorted to". Spring Creek Dist. v. Ry. Co. 249 Ill. 260. That case has been cited by appellee in support of his contention that the words "Funds now in the treasury" includes the surplus of the original over and above the first 90 per cent thereof. It is not in point on that contention. The Court was there determining whether at the time a certain debt was contracted the district was in debt over and above its assets. If it was so in debt the contract was **ultra vires** and void to the extent that the obligation exceeded the 'funds on hand" at the time the contract was made and the court there held that a certain parcel of real estate of the value of $8000 that was not necessary for the right of way of the district, but to which the district had the legal title and which had been included in the report of assets of the district, should be included in the computation of funds on hand. The situation there was very different from the

facts before us in the case at bar. Not only had the county court undertaken in this case to abate all of the original assessment above 90 per cent, but the order giving appellees the right to borrow the $7000 in question and the petition on which it was based excluded the original assessment from the source of revenue from which the money could be repaid, and Franklin who loaned the money and to whom the order in question was given, knew all about it for the evidence shows that he was told that the surplus of the original assessment had been remitted and that if he loaned the money, the warrant he would be given for it would have to be paid out of that portion of the additional assessment not needed to pay the bonds issued against it and the balance if any, would have to be paid out of the annual benefits. He was also given a copy of the

order of the County Court under which the commissioners were acting. He is therefore in no position to claim that he did not make this loan deliberately with his eyes open and without thought of the original assessment as a source of repayment.

Our attention is called to the fact that when this case was before us on the first appeal we said "The order can only be paid out of the assessments made when it was issued. Section 38 of the Levee Act makes warrants for borrowed money a lien on the assessments and **if this warrant is ever paid** it must be paid out of the excess of the assessments above the bonds." We adhere to that announcement. It is undoubtedly correct. If the averments of the amended bill, which when the above language was used were admittedly true, had been established by the proof the decree of the Circuit Court now before us

would have been correct, but as the proof conclusively shows that the permission to borrow money was limited to the power to pledge the funds on hand and the surplus of the additional assessment after the bonds issued against that assessment have been retired, to repay the loan, the decree of the Circuit Court must be and is modified so as to exclude from the lien of the warrant in question any funds arising from the original assessment and as so modified is affirmed.

Decree modified and affirmed.

552a

Gen. No. 6923. APRIL TERM A. D. 1918. Ag. No. 68.

WILLIAM M. VIGAL, Appellant

vs.

L. L. MATHEW, Appellee

214 I.A. 646

Apepal from the Circuit Court of Sangamon County.

GRAVES, P. J.

Appellee was the tenant of appellant on a farm. By the terms of the lease appellant was to have as rent one-half of the grain raised on the premises. Appellee raised both corn and oats. The oats were harvested and appellant received his half of the same. He raised 1852 5-7 bu. of corn. When the corn was harvested appellee did not turn any of it over to appellant, but instead tendered to him $555.81 in money, claiming to have purchased the same of appellant for 60 cents per bushel by an oral agreement entered into in September before it was ready to harvest. This suit was brought to recover of appellee for the value of one-half of the corn raised at the market price thereof at the time it should have been delivered. There is no dispute as to the amount of the corn raised or as to the sufficiency of the tender if the claimed sale to appelle is established. Neither is it disputed that the value of the corn at the time it should have been delivered to appellant under the terms of the lease was considerably more than 60 cents per bushel. The jury found the issues for appellant in the amount of the tender $555.81 and judgment was entered in his favor for that amount and against him for costs. The landlord appeals.

There is ample evidence to support the verdict as to the fact that a verbal contract for the sale of the corn from appellant to

appellee for 60 cents per bushel was made in September before the corn was harvested or ready for harvest.

When appellant the plaintiff was on the stand as a witness in chief in his own behalf he testified to the contract under which appellee occupied the premises, the amount of corn raised, its value at the time it should have been delivered to appellant and the fail-

ure of appellee to deliver it acocrding to the contract of leasing. He did not testify in chief anything about the claimed contract of sale of the corn to appellee in September. On cross examination appellee's counsel was allowed to interrogate appellant as to that transaction. This is complained of as error. The cross examination of a witness who is a party to the suit need not be confined to the subject matter of the examination in chief. **Felsenthahl Co. v. North Assurance Company** 284 Ill. 343-345. The extent to which a cross examination of a witness will be permitted is alrgely in the discretion of the trial court and will not cause the reversal of a judgment unless that discretion has been abused. **Brennan v. Chicago anl Carlinville Coal Co.** 241 Ill. 610. There was no abuse of the courts discretion in permitting the cross examination of appellant in this case.

Several times on the cross examination of witnesses and at least on one occasion in the direct examination of a witness in rebuttal, appellee undertook to introduce proof of conversations tending to show that appellee claimed the right to take 80 pounds of corn per bushel under his contract of purchase and was denied the privilege by the rulings of the court. Even if under some circumstances such a ruling

would have been erroneous, it is clear that is was not so here. The proof shows that only 70 pounds was to be taken if the corn was harvested after the elevator began to store corn and that it was not harvested until that time. Again in appellant's argument filed in this court he says "It is not in dispute * * * * that said one-half amounted to 926 5-14 bushels of corn." Under those circumstances even if the ruling had been wrong, the error would have been harmless. Some evidence was offered by appellant and excluded by the court as conversations between the parties about the sale of the corn at times when no sale was consummated. There was no error in that ruling.

It is claimed by appellant that the jury should not have been instructed in regard to the plea of tender because the fact that $555.81 had been tendered was admitted by the pladings, the theory being that it gave

the fact of tender too much prominence. We fail to see how, leaving to the jury in this case the question of tender could have been harmful to appellant. The court might properly have gone farther and instructed the jury in apt words to the effect that a tender of the amount named had been made and that in all events the plaintiff was entitled to a judgment for the amount of the tender, but we do not find that such an instruction was requested by appellant. There is no reversible error in giving and refusing instructions.

It is lastly claimed by appellant that the sale of the corn in question even on the theory of appellee was void under the Uniform Sales Act. Paragraphs 1, 2 and 3 of Section 4 of Chapter 121 a, which is the statute referred to, are as follows:—

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"(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer **shall accept part of the goods or choses in action** so contracted to be sold or sold, and **actually receive the same,** or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

"(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery ,or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but, if the goods are to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

"(3) There is an acceptance of goods within the meaning of this section when the buyer, either or after delivery of the goods, expresses by words or conduct his asent to becoming the owner of those specific goods."

There are at least two reasons why the sale in question is not affected by the provisions of the act referred to. First, the corn sold as well as the land upon which it was then standing, was at the time of the purchase of the corn actually in the possession of appellee, the purchaser, and was never out of his possession from that time until after it had been harvested, weighed and placed in his bins. Nothing could have been done more than was done to have given him a more perfect or exclusive possession of it. The averment contained in appellee's third plea that he "did then and there re-

ceive and accept all of said corn so bought by him," was clearly proven. Second, appellee at the time of the purchase of the corn and afterwards in the presence of various persons expressed in words and conduct not only his assent to becoming the owner of it but stated that he was the owner of it.

The instruction given on the question of possession by appellee of the corn was more favorable to appellant than he was entitled to.

There is no reversible error in the verdict. The verdict is supported by the evidence, and the judgment is affirmed.

Judgment affirmed.

553 a

Gen. No. 6943. OCTOBER TERM A. D. 1918. Ag. No. 14

AMERICAN INSURANCE COMPANY, Appellee,

vs.

214 I.A. 646

J. R. CASSITY, Appellant.

Appeal from the Circuit Court of Edgar County.

GRAVES, P. J.

On April 28, 1914 appellant gave to a soliciting agent for appellee his application for a policy of insurance on certain personal property, the same to expire in 5 years. The premium for the whole term of insurance amounted to $104.50. For this premium appellant gave to appellee his promissory note to be paid in installments. The first intsallment was $35.00 and became due January 1, 1915. The second was for $35.00 and became due October 1, 1915, and the third was for $34.50 and became due May 1, 1916. The note contained a stipulation to the effect that if it or any installment thereof should not be paid when due, the whole premium should be deemed earned and the note become collectable. It was also stipulated in the policy that, should any change take place in the title or possession of the property insured or should the same be removed to a new location or the insured not be the sole and only owner of the property insured etc., the policy should be void. There was also a stipulation for the surrender of the policy by appellant under some circumstances and a pro rata adjustment of the premium. The first installment on the note was not paid when due and in February 1915 appellant sold part of the property and removed the portion not sold

to another farm. Several demands were made on appellant after the sale of part of the property and the removal of the rest and after default in the payment of the first installment on the note for the payment of the premium note, but it was not paid. Sometime before September 5, 1917, a suit was begun before a justice of the peace for the collection of the note. Appellant deposited with the J. P. $34.50, the amount he claimed was due on the note. From a judgment in the justice court the case was appealed to the Circuit Court of Edgar County where it was heard by the court, a

jury being waived. There was a finding and judgment against appellant for $158.73 and for costs. Defendant appeals.

The insurance was for one year. The premium was a lump sum. The fact that the note given for the premium provided for its payment in installments did not prevent the contract from being an entire one for insurance for five years on the one hand and the payment of $104.50 premium on the other hand. The stipulation in the policy that in case there should be a change of title or possession of the property or if the same should be removed to a new location the policy should be void, did not render the policy void except at the option of appellee. **Man. & Merch. Ins. Co. v. Armstrong** 145 Ill. 481, **Germania Ins. Co. v. Klewer** 129 Ill. 607, **Kempshall v. Veeder** 79 Ill. App. 368. **Germania Ins. Co. v. Koehler** 168 Ill. 283, and there is nothing in this record to indicate that appellee ever elected to declare the policy forfeited. The provision for the surrender by appellant of the policy for cancellation

is not available as a defense to the note in this case because appellant did not offer the return of the policy or demand its cancellation nor did he ask for an apportionment of the premium until after this suit on the note had been commenced. There is no error in this record and the judgment is affirmed.

Judgment affirmed.

354a

Gen. No. 6947. OCTOBER TERM A. D. 1918 Ag. No. 17

CLAUS H. STROH, Appellant,

vs.

214 I.A. 647

MATTHEW KERBER, Appellee.

Appeal from the Circuit Court of McLean County.

GRAVES, P. J.

Appellant began suit in trespass on the case to recover damages from appellee on the theory that he has maintained and is maintaining a dyke along the line of lands owned by him which prevents the water from coming naturally on to appellant's adjoining land from flowing therefrom over and through a natural depression or water course upon and over the lands of appellee. The case was tried by a jury who found the issues for the defendant who is the appellee here.

There is no question but that appellant is the owner of the dominant and appellee is the owner of the serviant estate. Neither is there any doubt that appellee at one time built a dyke or obstruction along or near the line of his lands which interfered with the free flow of the water coming from appellant's lands as it would naturally go.

The only defense appellee made in the Circuit Court was that the dyke in question was not the cause of the overflow of appellant's land and that his said land was low and flat and would have been submerged if no dyke had been there. Apparently, from the verdict returned, the jury believed the claims of appellee were correct.

The evidence as to the cause of the overflow of appellant's lands as well as the amount of damages, if any sustained by reason of the existence of the dyke in question was conflicting. We have read it all carefully and considered it in the light of the arguments of counsel and

do not feel justified in setting the verdict aside because of lack of evidence to support it on the question of actual damages. That appellant was entitled to nominal damage is beyond all question and for that reason the verdict for appellee was contrary to law, but we do not regard that as reversible error. As

to whether a judgment should be reversed, merely for the purpose of allowing a litigant to recover nominal damages there are two distinct lines of authority. By one line it is held that where a suit is begun in good faith for the recovery of substantial damages and the plaintiff fails in proving more than nominal damages it is error to render judgment against him for costs. This view is supported in other jurisdictions by many authorities, but in Illinois so far as we have been able to discover it is supported by one case only, i. e. **Schweer v. Schwabacher** 17 Ill. App. 78. While the Supreme Court in **Chickley v. I. C. R. R. Co.** 257 Ill. 491 said "This court will never reverse a judgment and award a new trial merely for the purpose of enabling a party to recover nominal damages." Citing **Comstock v. Brosseau** 65 Ill. 39, **Chicago, Wilmington and Vermillion Coal Co. v. City of Streator** 172 Ill. 435. **See also Thisler v. Hopkins** 85 Ill. App. 207, **The People v. Petrie** 94 Ill. App. 652.

Complaint is made of certain instructions given for appellee but the criticism is extremely technical and not well taken.

There being no reversible error in the record the judgment is affirmed.

Judgment Affirmed.

555a

Gen. No. 6954. OCTOBER TERM A. D. 1918 Ag. No. 56

FREDERIC A. DELANO et al., Receivers of the Wabash Railroad Company, Plaintiffs in Error

vs.

ST. LOUIS & NORTHEASTERN RAILWAY COMPANY, Defendant in Error

214 I.A. 647

Error to the Circuit Court of Montgomery County.

GRAVES, P. J.

The declaration in this case was filed to the January term 1912 of the Circuit Court of Montgomery County. It consisted of a special count and the Consolidated Common Counts. At the January Term 1916 after successive demurrers had been filed to the special count and disposed of and several amendments to such count had been made, the common counts were withdrawn and a demurrer was sustained to the special Count. Plaintiffs elected to abide by their declaration and the suit was dismissed with judgment for costs against them.

By this suit Plaintiffs in Error, as receivers of the Wabash Railroad Company, are seeking to recover from defendant in error part of the expense paid by plaintiffs in error for maintaining a watchman at a railroad crossing, over Sargent Street, in the City of Litchfield, Montgomery County, under a contract dated October, 16, 1905. It is alleged in the declaration that when this contract was made, The Wabash R. R. Co., was maintaining its railroad tracks and operating its railroad across the said Sargent Street and defendant in error was constructing its tracks in said street; that the contract referred to covered the

construction or installation of a crossing of the tracks of defendant in error over the tracks of the Wabash Railroad there; that in that contract it was provided that defendant in error should pay one half of the entire cost and expenses of any watchman, flagman, bell, gates or light, including installation, maintenance, renewals and operation, "that may be lawfully required by the municipal authorities of said City or by any legal authority at said crossing:" that at that time there was in force an ordinance of the

said city of Litchfield that was adopted on March 22, 1895, which provides that where any Railroad company shall in pursuance of a resolution or order of the City Council, be notified to keep a watchman or flagman at any point on its track where the same was crossed or intersected by any street it should be the duty of such Company to station and retain such flagman or watchman at such point under a prescribed penalty: that in August, 1901 the City Council of the City of Litchfield adopted a resolution wherein the crossing of tracks of plaintiff in error and Sargent Street was declared to be a place of danger and that "it is necessary that a flagman should be stationed" at that crossing: that plaintiff in error was notified of the passage of that resolution; that it maintained a flagman at said crossing from October 16, 1905, the date of the contract sued on, to Nov. 13, 1911 and paid out $2573.06 which was equal to $35.00 per month as salary and the sum of $5.08 for expenses.

The demurrer raises the quesiton whether the conditions mentioned in the contract of Oct. 16, 1905 upon the happening of which defendant agreed to pay one half of certain expenditures mentioned, have come to

pass. It is clear that neither the ordinance of 1895, the resolution of 1901 or the notice to plaintiff in error of that resolution had any reference to defendant in error or any condition resulting from the occupancy of Sargent Street by it, because it was not in existence at any of those times and so far as the declaration shows it was not then in contemplation. There is no averment in the declaration that the contract sued on was made with reference to then existing ordinances resolutions or conditions and there is nothing in the facts averred in the declaration from which it can be inferred that the then existing ordinances or conditions were to govern or influence that contract or the acts of liabilities of the parties to it. Although the ordinance was passed nearly ten years before the contract of Oct. 16, 1905 was made, and the resolution was passed more than six years before that time and the notice of its passage had been given the Wabash Railroad shortly after its passage no reference was made in the contract to any of these existing things but the condi-

tions precedent which were to be the basis of the obligation of defendant in error to contribute to the expenses sued for were spoken of as contingencies that might arise in the future. The language referred to being, "The party of the second part (the defendant) further agrees to pay one half (½) of the entire costs and expenses of any watchman, flagman, bell, gates or light including installation maintenance renewals and operation that **may be** lawfully required" etc. If the contract was intended to have reference to the then existing ordinances and conditions it is fair to presume that some apt words would have

been used to indicate such purpose.

There is another thing that is quite persuasive that existing ordinances and conditions were not in mind when the contract was made and that is that no attempt was made to collect from defendant in error the one half of the expenses now sued for until late in 1911, or about six years after the obligation to pay the same existed according to the present contentions of plaintff in error.

By the terms of the contract sued on the payments that were to be made were for the expense of watchmen, flagmen etc., that may be **"lawfully required"** by some legal authority. Before a railroad can be "lawfully required" to furnish flagman etc, at crossings in municipalities, under existing laws, an ordinance must be pased by the legislative body of such municipality declaring the necessity therefor. **Village of Altamont v. B. & O. S. W. Ry. Co.** 184 Ill. 47. The ordinance relied on in the declaration under consideration does not declare a necessity to exist for a watchman or flagman or anything else at any place in the city. It is only when a railroad company is notified in pursuance of a resolution or order of the city council to keep a watchman or flagman at some designated spot that it becomes necessary to do so by the terms of the ordinance. A resolution is not an ordinance and it is not a compliance with the law requiring a city to declare by **ordinance** the necessity for a flagman or watchman, for the city to declare by **resolution** that condition to exist. The declaration by a city council that a watchman

or flagman is necessary at a given place in a city is a legislative act and must be done by ordinance. It can not be done

by mere resolution. **C. N. P. R. R. Co. v. City of Chicago** 174 Ill. 439. **The People v. Mount** 186 Ill. 560.

The declaration does not show that the contract was made with reference to the then existing ordinances or conditions in the city of Litchfield or that plaintiff in error has ever been lawfully required by any legal authority to keep a watchman or flagman at the Sargent Street crossing or at any other place in the said city, and for those reasons it does not state a cause of action. The Demurrer to the Declaration was properly sustained and the judgment of the Circuit Court is affirmed.

Affirmed.

556a

Gen. No. 6957. OCTOBER TERM, 1918. Ag. No. 24.

ISAIAH D. TIMBERLAKE, Appellee,

vs.

GRANITE LIVE STOCK INSURANCE COMPANY, a corporation, Appellant.

Appeal from the Circuit Court of Hancock County.

GRAVES, P. J.

214 I.A. 647 3

Appellee brought this suit to collect from appellant on a live stock insurance policy, damages for the loss by death of a stallion owned by him. The declaration is based on the theory that the horse died suddenly and that his death was not caused by any previous sickness. Two of the counts allege that notice and proof of death were given as required by the policy and one count alleges that appellee denies liability on the policy and relies on such denial as dispensing with proof of loss. Numerous pleas were filed by appellant. The third plea set up the provision of the policy that in the event of the death of the animal insured the body should not be disposed of until the company identified it, except upon the order of the company in writing and avers that appellee had not complied with that provision of the policy. A demurrer to this plea was properly sustained. A pleading is always construed most strongly against the pleader filing it. This plea does not show that the failure of appellant to identify the body of the animal before it was disposed of was the fault of appellee or that appellant did not have ample time in which to identify the body before it was disposed of or how long a time after the death of the animal elapsed

before the body was disposed of.

The sixth plea sets up that the policy provides, in case the home of the animal be changed from the premises given in the application the policy would be void and that it was so changed. To this plea plaintiff replied double. First that the horse was temporarily taken from the place where he was insured but was returned long before his death. Second, that the horse was returned to his original home long before his death and remained there to the time of his death and that

his being away in no way contributed to his death. A special demurrer to these replications challenged their sufficiency because they neither traversed or confessed and avoided, the plea: that they raised collateral issues: that they concluded with a verification when they were in fact argumentative pleas in travers. Neither of these replications deny the facts set up in the sixth plea but they both in effect confess its truth and undertake to set up other facts in avoidance of the averments in the plea that are so confessed.

It is not essential to the sufficiency of a replication in confession and avoidance that it in express terms admits the truth of the plea; if it does so in legal effect, it is sufficient. Provisions like the one in question do not invalidate a policy unless it is declared forfeited while the prohibited conditions exist and before the loss occurs. They only suspend its operation during the time the provision is being violated. **Traders Ins. Co. v** 163 Ill. 256. **German Fire Ins. Co. v. Klewer** 129 Ill. 599. **Manufrs. & Merchants Ins. Co. v. Armstrong** 145 Ill. 469-481.

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A similar situation is created by the eighth plea and the third replication to it, and what has already been said disposes of both matters. The three replications referred to were each good and the demurrer was properly overruled.

Appellant says the main controversy on the trial was whether the horse died suddenly without previous sickness or as the result of previous sickness. The jury heard this case. There is plenty of evidence from which they could reach the verdict they did without doing violence to the law. In fact the evidence is practically all one way and that is to the effect that the horse died suddenly and not as a result of any former sickness.

Appellant claims that the giving of appellee's third instruction was error. The instruction is as follows:—

"You are further instructed that if at the time the application for insurance of the horse in question was made, the defendants had one or more agents present who filled out or assisted in filling out the application and that such agent or agents at the time saw and examined the horse and observed then that the horse had eczema of the legs, and that with full knowledge of that fact such agent or agents took the application for

insurance on the horse ,that afterwards the insurance policy in evidence was delivered to the plaintiff, then the defendant cannot defeat a recovery in this case on the ground that the horse had eczema of the legs, and that no telegram and registered letter were sent to the defendant, notifying it of that fact."

The instruction correctly states the law. There is no question but that the horse had eczema in the legs when he was insured and that the agent of appellant knew and commented on that fact. The knowledge of the agent was the knowledge of the company. Therefore, the policy was issued by the company with full knowledge that the insured horse had eczema. That being true no further notice from the owner was necessary to inform the company of what it already knew. We find no error in the record and the judgment is affirmed.

Judgment affirmed.

Mr. Justice Waggoner took no part.

557a

Gen. No. 6963. OCTOBER TERM A. D. 1918. Ag. No. 29

IN THE MATTER OF THE ESTATE OF ABRAHAM BROKAW, deceased, A. Irving Polhemus et al, objectors, Appellants,

vs.

214 I.A. 647

CHARLES BROKAW Et al, Executors, Appellees.

Appeal from hte Circuit Court of McLean County.

GRAVES, P. J.

This is an appeal from an order and decree of the Circuit Court of McLean County entered on appeal from the county court of that county in the matter of the final report and six current reports of the executors of the last will and testament of Abraham Brokaw, deceased, to which objections were filed. Abraham Brokaw died in March 1905, leaving neither widow nor children but leaving an estate worth approximately two million dollars, part of which was in valuable real estate and the balance was in money and securities, most of which were gilt edged. The entire estate was disposed of by will. Practically all of the real estate was distributed by the executors to various legatees without the trouble or expense of a sale. Nearly four hundred thousand dollars worth of the personal property was also turned over to different legatees in cash or in the original securities as the same came into the hands of the executors. Three executors were named in the will and all qualified. One was a lawyer of recognized ability. He had the active management of the estate for about three years when he died. Since that time one of the remaining executors has attended to the business of the estate. The remaining executor

seems not to have given it much time or attention. The will expressly provides that the estate shall be settled within two years after the testator's death. Although about fourteen years since the death of the testator have elapsed the estate is not yet settled. The executors have made six current reports and one final report of their acts as executors. The six current reports as abstracted show the following amounts collected from personal property and the amounts of commissions retained by them therefrom as follows:—

1st	Rep't	Am't	Rec.	$896,504.93	Com's	Ret.	$53,760.00
2nd	"	"	"	198,217.36	"	"	11,893.04
3rd	"	"	"	268,099.08	"	"	16,085.12
4th	"	"	"	80,174.64	"	"	4,810.78
5th	"	"	"	31,180.00	"	"	1,870.80
6th	"	"	"	1,353.31	"	"	81.19
		Total		$1475,529.71			$88,500.93

In these six current reports the money reported as received was all property treated as personal estate in the hands of the executors. Of these items the executors charged and retained six per cent as their commissions. In the final or seventh report the amount reported as received was $31,503.38 and was chiefly from the sale of real estate. On that fund the executors charged three per cent commissions which amounted to $945.10. They also charged the estate and retained from the funds $15,593.55 as their commissions figured at three per cent on $519, 785 the value of real estate which was distributed by them to legatees under the will without a sale. The total commissions so charged and retained by the executors was $105,039.58. The estate had some litigation by way of foreclosure suits and in resisting taxation. In this way large sums of money have

been expended for attorneys fees aggregating approximately $30,000. Appellants have grouped their objections under three heads:—

"1. Objections to the several amounts allowed to the executors as compensation in administering upon the estate."

"2. Objections to the several amounts allowed to the executors on account of fees paid out by them to attorneys employed by them in estate matters."

"3. Objections to claims and expenditures paid by the executors not properly allowed and which are not legally nor properly chargeable to the estate."

Upon an examination of this record two things become manifest. First, the only thing unusual about the Brokaw estate was its great size and its excellent condition, and second, that the executors lost no opportunity to charge the estate the limit allowed by law for their own services and expenses and that they also went to the limit and sometimes beyond it in the name of necessary expenditures in the administration of the estate.

Section 133 of Chapter 3 R. S. (Par. 182 J. & A. Statutes) provides that "executors and administrators shall be allowed as compensation for their services a sum not exceeding six per centum on the amount of personal estate, and not exceeding three per centum on the money **arising from the sale** of real estate with

such additional allowances for costs and charges in **collecting and defending** the claims of the estate and disposing of the seme, **as shall be reesonable."**

The provisions of the foregoing section is conclusive as to the limit of commissions that can be allowed to executors or administrators **Askew v. Hudgens** 99 Ill. 468, **People v. Allen** 25 Ill. App. 657, **U. S. Rubber Co. v. Peterman** 119 Ill. App. 610.

The only commission an executor or administrator is entitled to from real estate belonging to an estate is not to exceed three per centum **on** the **money arising from the sale** of real estate. The executors never had in their possession any money arising from the sale of

the lands valued at $519,785 that was divided among the legatees because it was not sold at all. It follows that the sum of $15,593.55 which the executors retained out of moneys arising from some other source than the sale of that land but which they took and held as a three per centum commission on moneys arising from the sale of land was misappropriated and they should be required to charge themselves with it in their final report. There is no merit in the contention of appellees that they were acting as trustees instead of executors in distributing that real estate. They had no title to the lands and did not undertake to convey them. Their acts were more like the acts of commissioners in a partition suit than trustees. They charged up these commissioners in their executors' report for dividing lands not sold. While it may well be and undoubtedly is true that the executors rendered valuable service and expended some time in making this division of lands, the fact remains, the lands were not sold: the executors did not have in their hands moneys from the sale of these lands and there is no law authorizing the payment of executors for dividing lands.

In determining what amount within the limit fixed by the foregoing section is a reasonable amount to be allowed as commissions to an executor or administrator on the amount of personal estate, the courts must be goverened by the circumstances in each case in the light of what other courts have held under like circumstances. If six per centum of all the personal property in an estate is the largest amount that can, under any circumstances be allowed to an executor by way of commissions for ad-

ministering personal property then certainly in this case, when there were no unusual combinations or difficulties in the settlement of the estate, one-half that amount or three percent should be an adequate amount. **Geiger v. Bishop** 231 Ill. 47. In that case the estate was nowhere near as large as this one and the administration of it was attended with proportionately very much greater difficulty. If three per centum was adequate in that case certainly it is adequate in this one. In the case of **Colton v. Coffee** 187 Ill. App. 558 commissions amounting to about one and one-half per centum was held to be reasonable and adequate. The executors should be required to charge themselves back with three per centum of the commissions they have retained for handling the personal property.

The amount paid out in this estate for attorneys fees was also excessive. One of the executors was himself a capable lawyer. He had the chief management of the estate for the first three years after the will was probated. An executor cannot ordinarily be allowed to expend the moneys of an estate for lawyers fees when he is himself capable of performing the services the lawyer is employed to perform. J. P. Lindley was the law partner of the first managing executor of this estate. We find that these executors paid Lindley, and Barry and Morrisey, a law firm that was associated with Lindley, in one case, the following items:

To J. P. Lindley:—

For Services in Ijams Case involving $10,000	$600.00
" suit against Hanna Mellinsh to collect $4400	500.00
" suit to enjoin collecting $87,000 back taxes	6,000.00
" in receivership matter	200.00
" 2nd suit to enjoin collection of $128,000 back taxes	10,000.00

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For Services for advice of executors in miscellaneous matters	3,000.00
" in six forclosure suits	600.00
" Exp. to Pontiac	1.44
	$20,901.44
To Barry & Morrisey for services in the last tax case	9,000.00
A total of	$29,901.44

Of the items paid Lindley the Circuit Court disallowed the $3000 for general advice and cut down the

$10,000 fee in the case where he was associated with Barry & Morrisey to $3,800 and allowed the balance which amounts to $11,701.44 and allowed the Barry & Morrisey bill for $9000 in the case in which the fee of Lindley was cut down to $3800, and allowed all the other items paid for attorneys fees.

We have carefully examined and considered all the evidence in this record as to what services were rendered in the two chancery cases brought by the executors to enjoin the collection of back taxes from the estate as well as the opinion evidence of attorneys as to what such services were worth. The first case involved about $87,000 and the second involved the same $87,000 and $41,000 more or about $128,000 in all, of back taxes that the deceased should have paid in his lifetime. The basis of the executors' contention in that suit was that the Board of Review at the time it made the first assessment acted without jurisdiction. In that suit Lindley alone represented the executors. He prepared and filed a bill for an injunction, procured a temporary injunction and after issue was joined on it the same was heard on bill and answer and the temporary injunction was made permanent, and no appeal was taken. Lindley charged and received $6,000 for his services in that case. The basis of the second suit was that

the action of the various assessors who had assessed the property of the deceased during his ilfetime were **quasi res judicata** and that as their acts had not set aside during the lifetime of the deceased they could not be re-opened after his death. J. P. Lindley and Barry and Morrisey prepared this bill and filed it. A demurrer to it was filed and heard and overruled, answers were filed and exceptions to the answers were filed and heard and disposed of, the cause was referred to the master in chancery who took about thirty pages of evidence. The master reported the evidence and his conclusions of law and fact. Exceptions to his report were heard and disposed of and a perpetual injunction was issued restraining the collection of the back taxes. The case never went beyond the Circuit Court. For this case Lindley charged and was paid by the executors the sum of $10,000 and Barry and Morrisey charged and received

$9,000. By this litigation the estate was saved about $128,000 and the attorneys fees alone amounted to $25,-000, or approximately one-fifth of the amount involved. The Circuit Court reduced Mr. Lindley's fee in the last case to $3800 and allowed the claim of Barry and Morrisey for $9000. While the amount involved in litigation is supposed to influence to some extent the amount of fees the lawyers engaged may reasonably charge for their services, it is not all controlling. The amount of time spent by counsel in the particular service: the character of the service rendered, the ability of counsel and the results of the litigation should all be considered in connection with the amount involved in fixing what the fees should be allowed.

In this case it is not doubted that the ability of counsel; the character of the services rendered and the results obtained were all the best. It is, however, inconceivable how either firm of attorneys could have spent over thirty days in either of those cases. While there has been considerable proof tending to show that a number of lawyers of the McLean County bar considered ten per centum of the amount involved in these two cases to be a reasonable, customary and usual fee for like services in that county, there is also testimony that those services were reasonably worth as little as $5000 for all the services of Lindley and the firm of Barry and Morrisey in these two injunction cases. A court is not bound by the opinion of lawyers as to the amount of fees to be allowed attorneys in any given case, but should exercise an independent judgment in determining those questions. **Reinke v. Sanitary Dist.** 260 Ill. 380, **Gentlemen v. Sanitary Dist.** 260 Ill. 317. The testimony tends to show that as to the last case Mr. Lindley and Mr. Barry of the firm of Barry and Morrisey did about an equal amount of the work so that it is apparrent that the firm of Barry and Morrisey should have about an equal amount in fees with Lindley in the last injunction case. The same judge who heard the last injunction case also heard this case and after hearing all of the evidence and considering it in the light of his own knowledge of what was done in the case and also of his own experience and judgment as to the reasonableness of attorneys fees, reduced the charge of Mr.

Lindley in the last injunction case to $3800. We are fully satisfied that the court did not require too great a reduction in the Lindley fee and

and affirm his judgment in that respect. In view of the great weight of the testimony in the case to the effect that Lindley did his full, equal share of the work in that case with Barry and Morrisey we are unable to conceive how the allowance to Barry and Morrisey of more than the allowance to Lindley can be justified. We, therefore, hold that the fee of $9000 allowed to Barry and Morrisey should be reduced to $3800 the same amount as allowed to Lindley.

The $6000 fee allowed to Lindley in the first injunction case is also excessive. In view of the apparent conclusiveness of the proposition made the basis of that bill and the proof in the record as to the time expended in that litigation, we conclude that $3000 is ample compensation for the services rendered in that case.

A charge of $71.30 has been allowed against the estate for cleaning and repairing a house that one of the executors took as part of his legacy. There is no justification for its allowance.

After the death of Capt. J. H. Rowell who had active charge of the estate up to the time of his death, the surviving executors hired an auditor to check up Rowell's accounts and caused a charge of $50 to be allowed against the estate therefor. No theory is suggested on which that charge can be justified.

As to the claim that a bill of $25.54 was improperly paid by the estate to Edgar M. Heafter Tile Co., we have been unable to find in the record any evidence from which we can determine whether or not the claim was properly paid. Its allowance is therefore affirmed.

The costs of this proceeding were adjudged against the estate

to be paid in due course of administration. The litigation was made necessary by the improper charges of the executors. The estate should not be mulct in costs for the errors of the executors. It was error to adjudge the costs to the estate. The executors personally should pay the costs.

It is lastly contended that the executors should be penalized for wilfully failing to close up this estate within two years after the death of the testator. We are unable to find in this record anything to indicate that this contention was made in the Circuit Court. It not being presented there, it cannot be considered here.

The judgment of the Circuit Court is reversed, as to the amount of the allowances made to the executors as commissions; as to the amount of the allowance made to Lindley for fees in the first injunction case; as to the amount of the allowance made to Barry and Morrisey for fees in the second injunction case; as to the allowance of $71.30 for cleaning and repairing the house turned over to Charles Brokaw as legatee; as to the $50 paid the auditor for auditing the accounts of Capt. Rowell and as to the judgment against the estate for costs and is remanded to that court with directions to enter judgment in accord with the view here expressed. In all other respects it is affirmed. Judgment against Charles Brokaw and William Polhemus as individuals for the costs in this court.

Reversed in part, affirmed in part, and remanded with directions.

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Gen. No. 6964. OCTOBER TERM, A. D. 1918. Ag. No. 30

HAGERMAN STATE BANK Ltd., Appellee,

vs.

ADA M. MARINER, Appellant.

Appeal from Circuit Court McDonough County.

GRAVES, P. J.

214 I.A. 647 5

Appellee, Hagerman State Bank Ltd., began this suit against appellant by attachment and the attachment writ was levied upon about 240 acres of land in McDonough County, May 4, 1916. The declaration is in debt and counts upon a mortgage foreclosure deficiency decree as a judgment in **personan** against appellant rendered in the District Court of Gooding County, Idaho, on April 4, 1914. The amended declaration contains four counts, which allege that on April 4, 1914, appellee recovered in the District Court of Gooding County, Idaho, a judgment which remains unpaid and under the laws of Idaho bears 7 per cent interest. In the first count, it is averred that the judgment recovered was for $3,069.91 together with interest thereon from August 1, 1913, at 6 per cent per annum and for the further sum of $300.00 attorney's fees. It is also averred that it was ordered that certain mortgaged property be sold and the proceeds applied to the payment of the costs and judgment,

and if the encumbered property should not sell for enough to pay the judgment, that plaintiff have a deficiency judgment for the balance; that it afterwards appeared from the sheriff's return that the proceeds of sale were insufficient, and that a balance of $3,184.50 still remained due, whereupon on July 10, 1914, the Clerk did docket said judgment in favor of the plaintiff and against the defendant for $3,184.50 and that under the laws of Idaho and the rules and practice of its courts, the judgment so docketed became a lien upon the realty of said defendant, Ada M. Mariner, upon which execution could issue. The items of the judgment are then set out which show a total of $3,494.67. It is then averred that the encumbered property was sold for $400.00 and the costs of sale were $14.50 leaving a net credit of

$385.50 and avers that, after computing the interest on said judgment and giving credit for the abount of the sale of the property, there was a balance due on said judgment July 10, 1914, of $3,184.50.

The second count is substantially the same except that it omits any of the averments as to the sale of the encumbered property and the application of the credits. The third count is substantially the same as the first. The fourth count avers the amount recovered to be $1,404.67 which is the amount of the judgment less any credits.

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The appellant pleaded , 1st, **nul tiel** Corporation; 2d, **nul tiel** Record; 3d, payment; 4th, alteration of the record of the judgment by the Clerk by the procurement of the attorney for the plaintiff; 5th, a denial of the jurisdiction of the person of the defendant; 6th, a denial of the jurisdiction of the person of the defendant and further averments representing that defendant was represented in court by her attorneys and consented to the rendering of a judgment wherein the amount of the judgment was left blank, but that when the judgment sued on was rendered, she was not present in court and that her attorneys had no authority to appear for her and that the same was rendered without her knowledge or consent. Demurrers were sustained to the fifth and sixth pleas.

A jury was waived and the cause submitted to the court for trial. The Court, after hearing the proofs, rendered a judgment against appellant for the sum of $3,184.50 debt and $861.97 damages. A large amount of evidence was introduced. The record consists of 258 pages and 14 errors are assigned thereon. The abstract printed and filed in this court consists of 128 printed pages. It is substantially a recopy of most of the record. The brief and argument for appellant comprises 46 pages and not in one single instance is any page of the abstract or record referred to therein. This Court has repeatedly held that it cannot grope through a record or abstract to ascertain the facts re-

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ferred to by counsel in their arguments. The abstract itself could have been condensed to one half the space and is in violation of the rules of this court. To at-

tempt to pass upon the errors assigned on this record without any reference to the abstract or record where the controverted questions of fact might be found, would take more time than is at the disposal of this Court.

The judgment of the Circuit Court is affirmed.

Mr. Justice Waggoner took no part in the consideration of this case.

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Gen. No. 6965 and 6980 Consolidated. Ag. No. 59

OCTOBER TERM, A. D. 1918.

C. C. WILLIAMS AND NATHAN BOND, Administrators, Etc., Plaintiff in Error,

vs.

211 I.A. 648

JOHN L. HAMILTON, on Intervening Petition of the HOOPESTON HORSE NAIL CO., (Mac C. Wallace, Trustee in Bankruptcy for Hoopeston Horse Nail Co., substituted as Intervening Petitioner) vs. Nathan Bond, Receiver of Hamilton and Cunningham,

Defendants in Error.

Two Writs Error to the Circuit Court of Vermilion, County.

Consolidated.

GRAVES, P. J.

C. C. Williams and Nathan Bond as administrators of the Estate of James A. Cunningham, deceased, filed a bill for the appointment of a receiver of the late banking firm of Hamilton and Cunningham originally composed of one John L. Hamilton and James A. Cunningham, deceased. On a hearing of that bill Nathan Bond was appointed such receiver with authority to wind up the business of that partnership. Later an intervening petition was filed in that proceeding by the Hoopeston Horse Nail Company, by which it presented a claim against that partnership for about $9000. This practice is approved in Shedd v. Seefield 230 Ill. 118-127. That petition charges that two notes executed by the Horse Nail Co., and payable to and indorsed by the same company had been negotiated by Hamilton of the firm of Hamilton & Cunningham; that one of them for $4000 was negotiated to one Mrs. J. A. Clark and one for $5000 to the State Bank of Girard; that the said Horse Nail Company never received either the cash obtained by Hamilton therefor, or credit on the books of the firm

for the amount so received by him; that the note negotiated to Mrs. Clark was dated April 9, 1908, due in thirty days after date and the one negotiated to the Girard bank was dated Sept. 4, 1908 and

was due four months after date.

Nathan Bond the receiver of the Hamilton & Cunningham partnership answered the petition and denied that the partnership of Hamilton & Cunningham was indebted to the Horse Nail Company in any amount. He also plead the Statute of limitation and a set-off in favor of the Cunningham Estate. The cause was on May 11, 1916 by agreement of parties referred to the Master in Chancery to take evidence. The master took the proof and filed his report of evidence and findings at the January Term, 1918, of that Court.

On March 8, 1918, nearly two years after the Horse Nail Company's claim was referred to the master and after he had filed his report thereof, C. C. Williams and Nathan Bond as Administrators of the Estate of James A. Cunningham, deceased, with the will annexed, asked leave of Court to intervene for the purpose of filing an equitable set-off on behalf of the Cunningham estate against the claims of the Horse Nail Company presented against the firm of Hamilton & Cunningham but leave to do so was denied. By their petition they show that the claim day in the James A. Cunningham Estate was in the April term of the probate court of Vermilion County A. D. 1910 and that no claim was filed by the Horse Nail Co., against that estate on the claim day or at any other time; that the partnership of Hamilton & Cunningham ceased

to do business June 1, 1909 and that the said John L. Hamilton was then insolvent and has since remained insolvent; that the individual estate of James A. Cunningham is solvent and responsible for the firm debts and the personal debts of the said Cunningham; that the Horse Nail Company is indebted to the Cunningham Estate and to others in a large amount for moneys paid on debts of that Company for which Cunningham and others were sureties and that he and others were sureties on a large amount of other obligations of the said Company which they must yet pay; that the said Horse Nail Company is insolvent; that the debts of the said Company already paid by the said estate and others jointly liable with it as well as the said debts of the said Company which must yet be paid by them are many times greater than the claims presented

by the said Company against the banking firm of Hamilton & Cunningham and that because the estate of Cunningham is the only responsible source of payment of the debts of that banking firm and the said Horse Nail Company is insolvent and bankrupt, the estate is entitled to an equitable set-off against the said Company to the estate of the claims it has against the said firm of Hamilton & Cunningham.

On a consideration of the master's report the same was approved and a decree was entered allowing the claim of the Horse Nail Co., against Hamilton & Cunningham. A writ of error has been sued out by Nathan Bond receiver, to have the action of the court in allowing the claim of the Horse Nail Company reversed, and a like writ has been

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obtained by Williams and Bond, administrators, to test the correctness of the action of the court in denyng their motion for leave to intervene and file a set-off. These two cases have been consolidated.

Defendant in Error filed in this Court a motion to dismiss the writ of error sued out by Williams and Bond as administrators, which motion was taken with the case.

Section 91 Chapter 110 R. S. provides that appeals and writs of error may be allowed to review final judgments orders and decrees of **nisi prius** Courts. The right of a party to appeal or to have a writ of error is purely statutory. Except in cases where the legislature has provided that appeals may be taken or writs of error had to review interlocutory orders, there must be a final judgment to warrant such proceeding. **Jenkins & Reynolds Co. v. Wells** 220 Ill. 452-454.

A judgment is only final when the rights of the parties are settled thereby **Rosenthal v. Board of Education** 239 Ill. 29, see also **Parsons v. Gorham** 117 Ill. 137, **Sholty v. Sholty** 140 Ill. 81, **R. R. Co. v. Trust Co.** 70 Ill. 249, **Gray v. Ames** 220 Ill. 251. An appeal cannot be taken from an order refusing to permit a party to intervene as a defendant in a Chancery case where the rights of the parties on the merits have not been adjudicated. **Scherz v. People** 105 Ill. 26 cited in **Jenkins & Reynolds Co. v. Wells** 220 Ill. 452. The petition of

the administrator of the Cunningham Estate shows on its face that Hamilton, the former partner of Cunningham, is alive and that there are others who have contributed with the Estate of

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Cunningham to pay the obligations of the Horse Nail Company who have a like claim with that estate to reimbursement out of any funds that may come into the hands of the receivers of the Horse Nail Co., that are not parties to this suit. It is therefore apparrent not only that the rights of the Estate have not been adjudicated but could not be adjudicated upon the petition of the Estate to intervene, the order denying the Estate the right to intervene was not a final order and the writ sued out by the Administrators is dismissed.

A very large part of the briefs of both parties is devoted to the question of equitable set-off. That question is interesting and would be important if the writ of error prosecuted by the administrators of the Cunningham Estate had been prosecuted from a final judgment.

The writ of error remaining to be disposed of is being prosecuted by the receiver of the banking firm of Hamilton & Cunningham. Neither that firm nor its receiver is in any way legally interested in the claimed set-off of the Cunningham Estate. Such receiver could not have brought an action to recover on the claim of the Cunningham Estate made the basis of the supposed set-off. Only a person who could bring an action on a claim can make such claim the basis of recoupment or set-off. **Tuely v. Iron Works** 115 Ill. 544. A receiver only represents the firm or corporation whose affairs he is appointed to handle. He does not represent its creditors **Young v. Stephenson** 180 Ill. 608-614. **Gottlieb v. Miller** 154 Ill. 44; **Republic Life Ins. Co. v Swrgast** 135 Ill. 150-167.

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The receiver has plead the statute of limitations against the claim of the Horse Nail Co. The court has found that in whatever Hamilton did in the negotiation of the loans, the funds arising from which is the subject of controversy, he did for and through the banking firm and not for the Horse Nail Company and that the

said banking firm actually received the money derived from said negotiations, for the use of said Horse Nail Company but that the said Horse Nail Company never received credit therefor on the books of the said banking firm of Hamilton & Cunningham and never received the money so derived from such transactions or any part therof, and entered judgment in favor of the Horse Nail Company against the receiver of Hamilton & Cunningham for $9916.75 and interest and costs, and ordered distribution accordingly. The court also found that demand for said funds was made by the Horse Nail Company on Hamilton & Cunningham on July 1, 1911. The findings of fact of the Circuit Court were based on the findings of fact by the Master in Chancery who had taken the evidence. Such findings have all the force and effect in this court of a verdict of a jury. After carefully examining this record and the argument of counsel we are unable to give a satisfactory reason for holding that the findings of fact of the Circuit Court are not supported by the evidence. As between a bank and one of its depositors, the statute of limitations begins to run when a demand is made on the bank for the money deposited and it refuses to pay it, or when the trust relation is otherwise repudiated by the bank with the knowledge of the depositor. **Barnes v. Barnes** 282 Ill. 593-596.

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Horne v. Ingrahm 125 Ill. 198. **Davis v. Davis** 116 Ill. App. 36, **Barnett v. Wright** 29 Ill. App. 339. As found by the Circuit Court a demand was made for this money July 1, 1911. No other demand is shown by the proof to have been made. The statute of limitations did not therefore begin to run before that date. This claim having been filed within five years from that date is therefore not barred by the statute of limitations. Cunningham's estate seems to have been caught between the upper and the neither millstone and no way seems to have been found in which the courts can extricate it. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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560a

Gen. No. 6976. OCTOBER TERM A. D. 1918. Ag. No. 38.

FRANK YEAZEL, Appellee

vs.

BURRELL ENGINEERING & CONSTRUCTION COMPANY, a corporation, Appellant.

Appeal from the Circuit Court of Vermilion County.

GRAVES, P. J.

214 I.A. 648 2

Appellant built a grain elevator for appellee and his partner and placed therein a manlift to be used in reaching the top of the building. Shortly after the building was compleeted and turned over to the owners appellee undertook to use the manlift. When he had reached the top floor of the building he undertook to step from the manlift, the cable by which it was supported broke, and the manlift and appellee fell nearly or quite sixty feet. Appellee suffered a broken leg and other injuries. This suit was brought on the theory that the safety appliances called dogs that were placed on the manlift for the purpose of preventing it from falling in case the supporting cable should break, were not properly placed, but were in fact in a reversed position from what they should have been.

The summons in this case was served on one C. F. O'Connor as agent for appellant. He was the same person who as the representative of appellant negotiated the contract for the building of the elevator in question. At the return term of the court after this suit was commenced appellant entered its special appearance and filed pleas to the jurisdiction of the court on the ground that O'Connor was not an agent of the company within the meaning of the statute authorizing service of writs to be made on the agent of a corporation when the

president, secretary etc., of the corporation could not be found in the county. The issues formed on these pleas were tried by the Court and were determined in favor of the plaintiff, the court holding that O'Connor was the agent of appellant for the purpose of service of summons. A judgment **respondeat ouster** was e ntered, and the time in which appellant should plead over, was definately fixed.

Thereafter appellant filed a demurrer to the original

narr and later withdrew it. Later appellee had leave of court to file and did file an additional count, and appellant filed a second demurrer, which was heard and overruled. At a subsequent term of court the case was tried before a jury on the merits of such an issue as might have been formed if a proper plea and replication thereto had been filed. The record does not show that any plea to the merits was filed. Appellant appeared, however, cross-examined appellee's witnesses, offered evidence in its own defense; asked peremptory and other instructions, argued the case to the jury and participated in every way in the trial. The jury returned a verdict for the plaintiff, appellee here, and assessed his damages at $1709. Appellant then made its motion for a new trial which was denied and judgment followed.

Appellant now seeks a reversal of the judgment on the jurisdictional question. By the entry of a general appearance after judgment **respondeat ouster,** a party waives all errors that may have been in the hearing and disposition of a plea to the jurisdiction and gives the court complete jurisdiction of the person as fully, for all purposes as could be acquired by the service of process. **Franklin Life Ins. Co.**

v. Hickson 197 Ill. 117. **L. & N. R. R. Co. v. Industrial Board** 282 Ill. 136-141. **Hercules Iron Works v. E. J. & E. Ry. Co.** 141 Ill. 491. "Any act by the defendant, which recognizes the jurisdiction of the Court is a general appearance". **L. & N. Ry. Co. v. Industrial Board Supra.** Appellant in filing its demurrer to the narr and thereby asking the court to pass upon the sufficiency of it, recognized the jurisdiction of the court. It also recognized it in participating in the trial of the cause upon the merits although no plea on the merits was filed. By its acts appellant has waived any right to have the correctness of the action of the court on the hearing of the plea to the jurisdiction reviewed.

There is no controversy over the fact that the accident happened or that the reason it occurred was that the "dogs" in question were then upside down and not in a position to produce the results for which they were designed. The contest of fact was and is, whether they were in the same condition when appellant turned the building over to appellee and his partner as completed, as

they were at the time of the accident. On the one hand the testimony of workmen who installed the manlift in the building is that it was not in the same condition in the respect complained of when it was installed as it was at the time the accident happened, but a cross examination of these witnesses showed that they did not have a definate substantive recollection about it, but that they testified, rather to the condition they knew it ought to have been in and to their custom in installing like appliances than they did to their recollection of how this particular lift was left. On the other

hand the proof offered by appellee shows that it had never been changed in the respect complained of by any of the persons who worked in and about that building since it was turned over by appellant to appellee and his partner as completed. The lift itself was produced in court and offered in evidence by appellee and the proof tends strongly to show that the condition of the parts in question were in such condition as to paint that they could not have been altered between the time it was installed and the time of the injury without showing the marks of the alteration, and there were no marks of the alteration thereon at the time of the injury. A consideration of all this evidence leads us to the same conclusion the jury reached, namely, that thecondition of the lift had not been changed since the building was turned over to the owners by the contractors as completed.

Appellant argues that because it purchased the lift in an assembled condition, of a reputable manufacturer and installed it in the building in the condition it was delivered to it by the manufacturers, it is not responsible even if the appliance was defectively assembled. The rule sought to be invoked has application in an action where and employe is suing his employer for damages where the injury resulted from some latent defect in machinery purchased by the employer of a reputable manufacturer, but has no application to the facts in this case for one sufficient reason at least, and that is that the defect in question was not a latent one but was one that was open and obvious to men skilled and experienced in construction of work of the kind appellant was engaged in at the time this lift

was installed, as the evidence shows appellant's workmen were. If in fact, appellant's agents and workmen placed in the building a lift that was dangerously and obviously defective, it is no defense to an action for damages caused by the defect that it had nc knowledge of the defect, if by the use of ordinary care such knowledge would have come to it.

Appellant leastly insists that appellee has no right of action against it because the contract for the construciton of the building in which this lift was installed was not made with appellee, but with the firm of which he is a member. This is not an action on the contract but for negligence. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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Gen. No. 6979. OCTOBER TERM A. D. 1918 Ag. No. 41

R. A. STONE, et al, Appellants,

vs.

W. E. McDONALD, Appellee.

Appeal from the Circuit Court of Shelby County.

GRAVES, P. J.

214 I.A. 648 3

Appellants are partners in the real estate brokerage business. They claim that appellee listed his eighty acre farm for sale with them with the understanding that they were to sell it for $200 per acre and were to have two dollars per acre for their services in selling the same: that they sold it for $200 per acre and are entitled to $160 as commissions.

Appellee denies that he ever listed the farm with appellants for sale: that he authorized them to sell it or agreed to pay them two dollars per acre or any other amount for selling it: that they did not in fact sell it: that whatever transpired between him and them arose by their approaching him with a proposition to sell him a larger farm, for which they were the agents, and that whatever, if anything, appellants did to further the sale of his farm was for the purpose of closing out a sale to him of the larger farm and securing their commissions from the owner thereof. Suit was begun by appellants before a justice of the peace for $160 and was appealed to the Circuit Court and there tried. The jury found the issues in favor of appellee and judgment was rendered against appellants for costs. A careful review of the evidence shows that the verdict is not manifestly contrary to the preponderance thereof.

Appellants criticise by number, five instructions which they say were given at the instance of appellees. The abstract shows but four instructions given at the instance of appellee. There is a fifth instruction in the record that was given for appellee. Under the rules of practise in this court when all the instructions are not abstracted no error in instructions need be considered. We have, however, given careful consideration to all criticisms of given instructions and to all suggestions why the refused instructions should have been

given. It would be an unwarranted expenditure of time and spaces to point out and specifically answer all the contentions of counsel in regard to what he considers the erroneous rulings of the court in giving and refusing instructions. It is enough to say the criticisms are hypercritical and without merit. As a series the instructions correctly gave to the jury the law applicable to the case. We find no reversible error in the record and the judgment is affirmed.

Judgment affirmed.

Denied 1919

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Gen. No. 6983. OCTOBER TERM A. D. 1918. Ag. No. 44

F. G. CAMPBELL, Administrator of the Estate of Elijah H. Nesmith, deceased, Appellee,

vs.

PEARL HAZEN, Appellant.

214 I.A. 648

Appeal from the Circuit Court of Champaign County.

GRAVES, P. J.

This is a suit begun by appellee as administrator of the estate of Elijah H. Nesmith, deceased, to recover from appellant damage for causing the death of the said Nesmith by the negligent, careless and improper manner in which he ran and operated his automobile. As this judgment must be reversed for reasons that do not touch the real merits of the case, and the cause remanded for another trial, we will refrain from expressing any views on what the evidence shows or does not show.

When the attorney who represented appellee at the trial in the Circuit Court was making his opening statement of facts to the jury he said—"They asked the defendant why he did not stop or something like that, and he said that it was a good thing he was insured or something like that," an objection being interposed to that statement, the attorney said, apparently in explanation to the court—"I said he said that as a part of the conversation that was said at the time of the accident," and the Court replied, "admissions will be all right." During the trial on cross-examinaiton of a witness for the defendant the following occurred:—

"Q. Did you ever talk with anybody representing anybody connected with this suit?
A. No.

Q. Like Mr. Hazen isn't it true that you did talk to a man representing an insurance who came and took your statement, and that you signed it, isn't that true?

An objection to that question was sustained but the harm was done.

The jury by the opening statement of counsel and by this question undoubtedly understood that there was an insurance company that in some way was connected with the case. The suggestion was improper. It was immaterial to the question of the liability of appellant

whether there was an insurance company that was or might be eventually liable to pay a judgment against appellant or not. The injection of that idea into the minds of the jury was such a violation of the rights of appellant as to warrant a reversal of the judgment. No one can of course know just what effect that information had on the jury, but it is safe to say it would not make the jury more reluctant to return a verdict against appellant if they believed an insurance company would in the end be required to pay the judgment rendered on their verdict.

The instructions given at the instance of appellee are criticised. Several of them are long, rambling, argumentative and confusing. The purpose in giving instructions to a jury should be to assist them to understand the law and its application to the facts in the case being tried, so that the rights of the respective parties in the light of what the jury finds from the evidence the facts are may be preserved. In order to effectuate that end instructions should be clear, concise and to the point. They should be so worded as to be easily understood by the average layman, and so as not to mislead or mystify

him. When they are not so worded they should be refused and if given will usually cause a reversal of a judgment. The fifth, eight and ninth instructions given at the instance of appellee are as follows:—

5. The Court instructs the jury that it is the law that a person driving a motor vehicle upon a public street or highway, upon approaching another person walking upon or along such public highway, shall give reasonable warning of his approach and use every reasonable precaution to avoid injuring such person so walking upon or along such public highway, and if necessary stop his said motor vehicle until such person can safely proceed; and it is the law also that no person shall drive a motor vehicle upon any public highway in this state at a speed greater than what is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or any person; and it is also the law that if the rate of speed of any motor vehicle operated upon any public highway in this state, where the same passes through the closely built up business portions of any incorporated city, town or village, exceeds ten miles an hour, then such rate of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb of any person traveling upon such highway, but you are instructed that this does not mean that the driver of a

motor vehicle can under any and all circumstances operate his motor vehicle in the closely built up business portion of an incorporated city at a rate of speed of ten miles per hour without being guilty of negligence; but if a person shall drive a motor vehicle upon a public highway in this state at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb of any person traveling upon such highway, whatever the rate of speed may be, the same is unlawful; and you are instructed that in determining whether or not the deceased Elijah H. Nesmith was exercising due care and caution for his own safety at the time of and just prior to the injury, you have the right to take into consideration if shown by the evidence the provisions of the law as above set forth in this instruction, limiting the speed of automobiles and their operation upon the public street in question: and you also have the right to take into consideration and weigh with all the evidence, facts and circumstances proven in the case that, as a matter of law, the deceased Elijah H. Nesmith had the right to persume that the motor vehicle driven by the defendant Hazen, as it proceeded south on Neil street at the time in question, would probably not pass the point at which said Nesmith was standing or walking upon said Neil street at a rate of speed exceeding that allowed by the law, as above set forth in this instruction, provided these matters appear from the evidence in the case and the facts and circumstances proven on the trial.

8. The Court instructs the jury that even if you believe from the evidence that the collision between the automobile of the defendant and the person of Elijah H. Nesmith when he was first struck by the automobile was caused in whole or in part by some failure of the said Elijah H. Nesmith to use due care to avoid injury and that said Nesmith was caught by, or fell upon the fender or some other portion of the defendant's car and thereby become and was then and there in a position of peril, and that such position of peril then became apparent to the defendant or by the exercise of ordinary care, would have been then and there apparent to him. And if you further believe from the evidence that the said defendant then **could,** by the exercise of ordinary care, have avoided thereafter injuring Nesmith, and had a clear chance so to do; but that the said defendant, Hazen, did not then and there exercise due care and caution to avoid, thereafter causing injury to said Nesmith, but that said defendant Hazen, did thereupon negligently cause and permit the automobile he was driving to proceed upon its way without stopping or without attempting to stop the same, and that the body of the said Nesmith was carried some distance upon the fender or other part of the defendant's automobile; and that the said Nesmith then and there, while in such position of peril, did what an ordinarily

prudent man would have done to avoid injury to himself, and if the evidence shows that as a result of the negligent operation and movement of the automobile by the defendant Mrs. Nesmith's body was shaken or dragged off of the fender or other portion of said automobile and thrown to the pavement, and that the said automobile proceeded over the body of the said Nesmith, and that his leg was broken and he sustained injuries which caused his death and that such injuries were the proximate result of a failure of the defendant to use ordinary care to stop his automobile or avoid injuring Nesmith after the defendant had observed and known of the position of peril in which Nesmith then and there was or after the defendant by the exercise of ordinary care **could** have known of Nesmith's perilous condition, then in that

event of the proof, the defendant would be liable, and it would be no defense that Nesmith may, by want of due care, have contributed in the first instance to producing the position of peril in which he was so placed if the evidence shows the same.

9. The Court instructs the jury that the plaintiff is not required in order to recover in this case to prove his declaration beyond a reasonable doubt, nor to convince the jury of the truth of the charge in some one or more counts of the declaration beyond a reasonable doubt, neither is it necessary for the plaintiff to prove beyond a reasonable doubt that the death of Elijah H. Nesmith resulted from the injuries he received in the collision with the defendant's automobile. But it is sufficient for the plaintiff to recover ,if he proves his right to recover by a preponderance or greater weight of all the evidence in the case; if the plaintiff has proven by a preponderance of the evidence in the case that the deceased was injured as charged in some one or more of the counts of the declaration, and has also proven by a preponderance of the evidence that the death of the said Elijah H. Nesmith resulted from said injuries, then this is sufficient under the law for the jury to do find in their verdict; and you are instructed that by a preponderance of the evidence is meant the greater weight of the evidence, and it does not necessarily mean the number of witnesses testifying to a given fact or circumstance, but it is the province of the jury to weigh the evidence and testimony of the witnesses, and if after considering all the evidence on the case, you find that the same preponderates in favor of the plaintiff and by the greater weight of the evidence the plaintiff has established his right to recover as charged in some count or counts of the declaration, then your verdict should be for the plaintiff.

None of these instructions should have been given. They more nearly fill the place of a speech to the jury than of instructions as to the law. Besides these general criticisms there are several positively erroneous statements of law contained in the series given at the instance of appellee. For instance, in the eighth instruction the jury are told that if appellant **could** by the exercise of ordinary care have avoided injuring the deceased and if appellant **could** by the exercise of ordinary care have known that the deceased was in a perilous position, on the fender of his car and he continued to keep his car in motion, then he was liable. That is not the law. To hold a person liable for what he **could** have done, or known, is holding him to a too high degree of responsibility. He can only be held liable

for what he would have done or known by the exercise of due care. **Gehrig v. C. & A. R. R.** 201 Ill. App. 287-293.

The seventh instruction is also bad because of the

erroneous use of the word "could" as already pointed out.

The ninth instruction lays down the rule to be that appellant was liable if they believe from a perponderance of the evidence "that the deceased was injured as charged in one or more counts of the declaration." This instruction is bad because it leaves it to the jury to determine what the declaration charges, and because it directs a verdict for appellee without requiring any proof of negligence of appellant.

Others errors in instructions have been pointed out but enough has been said to show that this judgment must be reversed and a discussion of all these errors would unduly extend this opinion. The judgment is reversed and the cause is remanded to the Circuit Court for another trial.

Reversed and Remanded.

563a

Gen. No. 6986. OCTOBER TERM A. D. 1918. Ag. No. 47

ELLA LEEDY, Appellee,

vs.

DECATUR RAILWAY & LIGHT COMPANY, a corporation, Appellant.

Appeal from the Circuit Court of Macon County.

214 I.A. 648

GRAVES, P. J.

This is an action on the case for personal injuries. The claim of appellee is that on the day in question she was desirous of taking passage on a car of appellant; that she was waiting at a place in a street in Decatur where the cars of appellant were usually stopped to permit passengers to alight from and to board them; that the car in question did stop and that a number of persons did board it and appellee attempted to board it, and that while she was so attempting to so board it the agents and servants of appellant suddenly started the car forward and appellee was thrown to the street and injured. The jury found the issues for the plaintiff and assessed her damages at $1500. The judgment was for that amount against appellant.

Appellant has pointed out in his argument seven disputed questions of fact and has argued them to considerable length. They are as follows quoting from its brief:—

"1. Did the defendant's servants give plaintiff a reasonable length of time to get aboard the car before the car was again started?

2. Did the plaintiff give notice to the defendant's servants that she intended to get aboard the car before the car started, or was she in a place where defendant was bound to take notice that she desired to board the car?

3. Was the car standing still or in motion at the time the plaintiff attempted to get aboard the same?

4. Was the defendant guilty of suddenly and violently starting the car forward while plaintiff was boarding same?

5. Was the defendant guilty of the negligence alleged in any one or more of the counts in the declaration?

6. Was the plaintiff guilty of contributory negligence in attempting to get aboard the car without giving any notice to the servants of the defendant of her intention of getting aboard the car?

7. Was the plaintiff guilty of contributory negli-

gence in attempting to get aboard the car when the same was in motion?"

The verdict of the jury finding the defendant guilty is a determination of all of those disputed questions in favor of appellee. That verdict was not manifestly contrary to the weight of the evidence.

There certainly was evidence in the record from which, taken by itself, with all fair inferences to be drawn therefrom, the jury could without doing violence in the eyes of the law, have found, (1) that the servants of the defendants did not give appellee a reasonable length of time to board the car before it was again started: (2) that appellee gave notice to the servants of appellant who were in charge of the car in question of her intention to board it before it started: (3) that the car was standing still when appellee attempted to board it: (4) that the car was started while appellee was boarding the same: (5) that appellant was guilty of negligence, charged in the declaration, that was the proximate cause of the injury: (6) that appellee was not guilty of negligence, of any kind that in any way contributed to her injury. That being true, the court properly denied the motion of appellant to peremptorily instruct the jury to find the defendant not guilty. **Libby, McNeil & Libby v. Cook** 222 Ill. 206; **Devine v. Delano** 272 Ill. 166. **Wilcox v. International Harvester Co.** 278 Ill. 465.

Appellant in one part of its argument criticises instructions

Page 2

2 and 3 given for appellee, but in another part waives all objection to them, except that they did not go further and state that the degree of care necessary to be used by appellant must be such as is consistent with the practical operation of the road. Each of these instructions was complete in itself without stating the limitations on the degree of care required of a common carrier of passengers suggested. Besides that, the facts in this case eliminate the qualification suggested. The negligence charged in this case is starting the car while a passenger was in the acts of boarding it, and no one has yet been heard to claim that the practical operation of a passenger car on a railroad will justify or excuse that conduct.

Appellant's fifth instruction as asked contained the

following final clause:—

"The defendant is only required to stop the car a reasonable length of time to afford passengers in the exercise of reasonable care, a reasonable opportunity to get on and off a street car."

The court modified the instruction by striking out the clause quoted. As already suggested, it was not an issue in this case whether the practical operation of the road or car required the servants of appellant to start the care when appellee was boarding it and no exigency in regard to the practical operation of any road would excuse so starting it. There was, therefore, no issue in this case that would warrant the giving of the instruction as presented.

It is lastly insisted that it was improper to permit the statement made by the conductor at the time to the effect that the brake or the bell "or something" did not work. It was not proper evidence,

but could have done no harm because no recovery is sought on the basis that the injury resulted from the failure of the servants of appellant to give a warning of its approach or for failure to stop the car in time as would have been true if appellee had been run down by the car. There is no reversible error in the record and the judgment is affirmed.

Judgment affirmed.

564 a

Gen. No. 6990. OCTOBER TERM A. D. 1918 Ag. No. 50

PURL NELSON, Appellant,

vs.

ISAM RIDDLE, Appellee.

Appeal from the Circuit Court of DeWitt County.

214 I.A. 649

GRAVES, P. J.

Appellant sued appellee before a justice of the peace on the following account:—

Debits.	
107 days at $1.04	$111.28
Husking 1104 bushels corn at 3½ cents	38.64
One-half day shocking oats, double time	1.04
Watermelon	.35
Tickets to Heyworth Fair	.75
Pork Chops	.50
Total	$152.56

Credits.	
Cash	$ 5.00
Tickets to County Fair	1.00
Shoeing horse	2.00
Oats for horse	4.80
Total	$ 12.80
Balance due appellant	$139.76

This case was tried in the Circuit Court on appeal from the justice of the peace. Judgment was entered against the plaintiff for costs.

Appellee claims the price for husking corn was three cents instead of 3½ cents per bushel making the bill for husking corn $5.52 less than claimed by appellant, leaving a total of debits of $147.04. He claims credits as follows:—

Cash	$9.00
Check	5.00
Cash	1.00
Ticket to Co. Fair	1.00
Horseshoeing	2.00
Oats	4.80
A total of	$22.80

Appellee also claims he made appellant a tender of $131.60 before the suit was commenced. The jury found the issues for the defendant and the court entered a judgment against appellant for costs. If appellee's contentions are correct appellant was tendered over seven dollars more than he was entitled to receive. If appellant is

correct in his contentions then appellee owed him $8.16 more than the amount of the claimed tender.

Whether the price for husking corn was 3 or 3½ cents per bushel; whether appellee is entitled to the credits he claims and whether appellee made the tender as claimed are all questions of fact that have been settled by the jury in favor of appellee. This whole case turns on the question of veracity. It was the province of the jury to weigh the evidence and judge of the credibility of the witnesses and give credence to those they believed worthy of it. This they have done, and we see no reason for disturbing their findings.

The jury was properly instructed as to what constituted a tender as well as to the other issues in the case and their verdict amounts to a finding that a tender was made by appellee to appellant before any costs were made and before suit was begun of at least as much as was due him, and he refused it apparently because he believed there was $8.16 more money due him. That issue also the jury have found against him.

There is no reversible error in this record. The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

565a

Gen. No. 6886. APRIL TERM A. D. 1918. Ag. No. 6.

THOMAS H. BARNES, Et Al,. Appellants.

vs.

A. C. STEENBURG, Et Al., Appellees.

Appeal from Circuit Court Fulton County.

ELDREDGE J.

214 I.A. 649 2

Thomas H. Barnes and John Prickett, appellants, filed their bill against A. C. Steenburg and W. Scott Edwards, appellees, to recover certain moneys which they were compelled to pay as sureties on the guardian bonds of said Edwards.

W. Scott Edwards was appointed guardian of Roy Winget and Maud Winget February 28, 1907, by the County Court of Fulton County. He qualified by executing a bond in the sum of $6,000.00. On April 9, 1907, he was appointed guardian of Effie Winget and executed a bond for the principal sum of $2,000.00 with Thomas H. Barnes, appellant, and W. T. Rucker as sureties. The Winget children were the minor heirs of Walter Winget, deceased.

On April 15, 1907, said Edwards as such guardian, filed a petition for leave to sell certain real estate owned by said minors and a decree was entered authorizing such sale upon his executing a bond, pursuant to the statute in the sum of $15,000.00 Such a bond was executed by Edwards with Prickett and Barnes, appellants, and Rucker, as sureties.

The real estate was sold February 19, 1910 for the sum of $9,270.00. Each of said minors was entitled to one-third of this amount. The money received from the sale of said real estate was deposited by Edwards with the banking house of A. C. Steenburg & Company, a co-partnership, comprising as its members, A. C. Steenburg, appellee, Alice W. Steenburg, Lloyd J. Marsh, Samuel Jack and Clyde Steenburg. $1,000.00 was paid to Edwards on the day of sale and the balance was paid February 21, 1910. All this money was deposited by Edwards to his own personal account and not as guardian and for the balance of the purchase price, $8,270.00, he received from the bank five certificates of deposit payable to himself

personally and not as guardian.

On May 23, 1910, A. C. Steenburg owned eighty acres of land and he and Jack, as tenants in common, each owned an undivided one-half in 400 acres of land, all of which was situated in the state of Wisconsin. On this date, Edwards entered into a contract with Steenburg and Jack for the purchase of said land for the consideration of $11,040.00. He paid to Steenburg $1,000.00 when the contract was signed and the balance was to be paid upon the receipt of an abstract showing good, merchantable title thereto. On August 27, 1910, the purchase was completed and Edwards paid the balance due by delivering to Steenburg two of said certificates of deposit amounting to $4,270.00 and a check for

$250.00. For the balance of the purchase price. Edwards executed a note payable to Steenburg and Jack and secured by a mortgage on the purchased premises. There is no dispute in the record that all the money paid by Edwards to Steenburg for the purchase of the Wisconsin land was paid out of the funds held by Edwards as guardian of said minors and that Steenburg was fully aware of this fact. There is no contention that Jack entered into any of the negotiations with Edwards for the purchase of the land or had any knowledge that it was being paid for by funds belonging to the guardianship estate.

Roy Winget and Maud Winget became of age in 1911, and there was due to Maud Winget at that time from Edwards as guardian the sum of $3,718.27, and to Roy Winget the sum of $151.59. In order to settle with these wards, Edwards procured a loan from Steenburg for the sum of $4,000.00. It is conceeded that Edwards out of this loan paid to Maud Winget $3,718.27.

Effiie Winget became of age June 30, 1913, and made a demand upon Edwards to make settlement and pay the amount due her out of the guardianship funds. The amount due her from Edwards as guardian was $4,670.11. Edwards failed to pay said amount and suit was brought upon the original $2,000.00 bond executed by Edwards, Barnes and Rucker, and another suit was brought upon the $15,000.00 bond executed by Ed-

wards, Barnes, Prickett and Rucker. Judgment was procured on the $2,000.00 bond for the sum of $1,938.70 and on the $15,000.00 bond for $2,906.53. When these suits were brought, Rucker had become a non-resident and no service was had upon him when the judgments were rendered, and while the judgments appear to have been rendered against him jointly with the others, there was no valid judgment against him. Barnes paid $1,-959.99 in satisfaction of the judgment on the $2,000.00 bond and Barnes and Prickett jointly paid $2,935.04 in satisfaction of the judgment on the $15,000.00 bond.

By virtue of the payments of said judgments, Barnes and Prickett became subrogated to all the rights and equities which the said Effie Winget had against Edwards and Steenburg with reference to the trust funds held by Edwards as guardian of said Effie Winget. Rice vs Rice, 108 Ill. 199; Robinson vs Roos, 138 Ill. 550; Lochinmeyer vs Fogarty, 112 Ill. 572. Steenburg came into possession of the trust funds with full knowledge of the trust impressed thereon and having such notice became himself a trustee. First Natl. Bank vs Leech, 207 Ill. 215; Supreme Lodge K. of P. vs Hinsey, 241 Ill. 384; Norton vs Hixon, 25 Ill. 439; Jackson vs Norris, 72 Ill. 367; School Trustees vs Kirwin, 25 Ill. 62; Moore vs Taylor, 251 Ill. 468; Wood

house vs Crandall, 197 Ill. 104.

The decree finds that the loan made by Steenburg to Edwards on January 9, 1911, which was used by the latter in settling with Roy and Maud Winget constituted a repayment of that amount by Steenburg leaving a balance of the trust funds still in his hands of $1,520.-00 and that said amount with 5% interest thereon from said date be paid to appellants. It is contended by appellants that the evidence shows that the loan of $4,-000.00 to Edwards was not made by Steenburg personally, but by the banking firm of A. C. Steenburg and Company. The only evidence on this question is the testimony of Edwards and Steenburg. The former testified that the money was loaned to him by the banking firm, while Steenburg testified that the loan was a personal one from him to Edwards. The burden of proof on this question was upon appellants, and upon

such a state of the proofs, this finding of facts by the Master and Chancellor will not be disturbed.

Numerous cross errors have been assigned by the appellees. It is urged that the bill is insufficient because Rucker was not made a party complainant. While he was a surety on these bonds, he was never served with process and no valid judgment was rendered against him. He paid no part of the judgments and had no right of subrogation.

He had no interest whatever in the subject matter of the suit. It is also claimed that the bill is defective because Jack was not made a party defendant. While he had received part of the purchase price on the sale of the Wisconsin lands, there is no evidence to show that he had any knowledge that Edwards was paying for them out of the funds held by him as guardian. All the negotiations for the sale of this land were had between Edwards and Steenburg, and Edwards had no knowledge that Jack had any interest in the lands until Steenburg presented him with the contract of sale for him to execute. The liability of Steenburg grows out of the fraud of knowingly receiving misappropriated trust funds and is based upon the commission of a tort and not upon a contract. Cooley on Torts, 2nd Ed. 612-614. The injured party may sue one or more of several joint tort-feasors. Tandrup vs Sampsell, 234 Ill. 526. Jack was not a necessary party defendant.

What has been said disposes of the other errors and cross errors assigned, and the decree is affirmed.

566a

Gen. No. 6896. APRIL TERM, A. D. 1918. Ag. No. 46

Fred W. Potter, Insurance Superintendent of the State of Illinois,

vs.

Northern Life Insurance Company,

Emma J. Tice, Appellant,

vs.

Sangamon Loan & Trust Company, Receiver, Appellee.

Appeal from Circuit Court Sangamon County

ELDREDGE J.

214 I.A. 649 3

Fred. W. Potter, Insurance, Superintendent of the State of Illinois filed a bill December 20, 1911, against the Northern Life Insurance Company of Illinois for an injunction to restrain said company from further doing business and for a receiver thereof. The Sangamon Loan & Trust Company of Illinois was appointed receiver. An order was entered that all claims against the receiver should be filed by intervening petition. Proofs of death of Frank B. Tice, who had been insured by said insurance company, were filed with the receiver September 19, 1912 by Emma J. Tice, appellant, the beneficiary named in the policy, and she also filed her intervening petition Jan. 7, 1913. In her intervening petition, it is alleged in substance that the insurance company had issued its policy of insurance on the

life of Frank B. Tice, February 23, 1910, for $10,000.00; that said Tice died October 6, 1911 and that the policy was in full force and effect at that time; that she was the beneficiary named in said policy and intitled to the insurance and asked that said receiver be directed to pay her claim. In the answer of the receiver it is admitted that the policy was issued but it is denied that it was in full force and effect at the time of the death of the insured and it is averred therein that long prior to the death of the insured, the policy had lapsed and had been cancelled by the company.

The Court referred the cause to a special Master in Chancery to take proofs and report the same with

his conclusions to the court.

The findings of the Master in Chancery so far as material are as follows:

"The Northern Life Insurance Company, on to-wit, February 23, 1910, issued its policy of insurance on the life of one Frank B. Tice, of Polo, Illinois, for $10,000.-00, in which policy Emma J. Tice, mother of the insured, intervening petitioner herein, was named as beneficiary. The insured gave his note of said date to one Daniel J. Holmes, the local agent of said company, in the sum of $273.10, in payment of the first year's premium. Later in the same year he also gave the company his note for said premium. This second note, however, was returned by the company to Holmes and by him to the insured. Repeated efforts were

made both by the company and Holmes to collect the first note, both before and after March 23, 1911. At the time of his death the insured had paid only $45.00 to Holmes, in installments, some before and some after March 23, 1911, which payments were credited by Holmes on the first note. After his death his beneficiary paid the balance due on said note to Holmes, who sent his check for the amount to the company. The company refused to accept the check and returned the same.

Sometime after April 9, 1911, the insured made and delivered to Holmes a second note under date of February 23, 1911, for $273.10, payable to the order of said Holmes, due one year after date, upon which note nothing was ever paid. It is not clear whether this second note was a renewal of the first note or a note for the second year's premium. It seems most probable that Holmes and the insured intended it as a note for the second year's premium. The company, however, did not authorize the taking of such note and had no knowledge of it until after the death of the insured.

The policy of insurance when issued was sent to the agent, Holmes, and by him delivered to some bank or banker at Polo, Illinois, whether for the insured or the company is not clear. It does appear, however, that Holmes at all time had control of it. That during August, 1910, he took the position that the policy had never been delivered

and returned the same to the company for cancellation. The policy was kept in force by the company for one year and thirty days or until March 23, 1911, upon which date it was treated as having lapsed because of failure to pay the second year's premium and was cancelled. At the time Holmes took the note which intervenor claims was for the second year's premium, the policy had been returned to the company and properly cancelled. No application for reinstatement was ever made afterwards, no evidence of insurability was ever offered, no new policy ever issued, and there was no insurance in force at the time of the taking of said note. Holmes knew this was the situation, as evidenced by all of his correspondence with the company. It appears that he hoped to get the notes paid up and then get the insured reinstated. He took a number of personal notes from the insured, enough, apparently, to cover both years' premiums, was charging the insured an extra rate of interest and promised to take care of him if said notes were paid up. For this purpose he was the agent of the insured and not of the company. The statement of the company to Holmes, under date of June 13, 1911, "We will leave the matter entirely in your hands,' was a response to a letter from Holmes to the company under date of June 11, 1911, in which he said, 'If you will allow me to handle this matter without interference, I think I can collect the entire note (Meaning note for first years'

premium during which time the insurance was in force) and reinstate Mr. Tice and induce him to keep up his policy.' This gave Holmes authority to handle the matter as he thought best, but only within the law and the rules of the company, which required payment of premiums due, evidence of insurability, reinstatement and the issuance of a new policy, before the insurance would again be in force. It was apparently the intention of Holmes to get the notes made to him, by the insured, paid up on the installment plan and then have him reinstated under the rules of the company. He had no authority to waive these requirments. Frank B. Tice, the insured, died by drowning during the month of October, 1911, after

his policy had lapsed and been cancelled, without having been reinstated and without having paid anything on any of said notes to Holmes except the sum of $45.-00 on the first premium note, for which sum he had one years and thirty days' insurance.

The master finds by reason of the facts aforesaid that the intervening petition of Emma J. Tice should be dismissed for want of equity and recommends an order in accordance with this finding."

Numerous objections were filed by appellant to this report which were renewed as exceptions in the Circuit Court. The Court overruled the exceptions and dismissed the petition of appellant for want of equity. The proofs fully sustain the findings and conclusions of the Master and the Court and the decree is affirmed.

567a

Gen. No. 6904. APRIL TERM, A. D. 1918. Ag. No. 52.

CHARLESTON STATE BANK, Appellee,

vs.

ISAAC B. CRAIG, Appellant.

Appeal from Circuit Court Coles County.

ELDREDGE, J.

214 I.A. 649

In May, 1906, appellant and appellee entered into the following contract:

"Witnesseth: that whereas said party of the first part is the owner of a certain judgment rendered in the Coles Circuit Court in favor of B. E. Brooks against C. W. Hahl on which there is now due the sum of Three Thousand Dollars ($3000.00), and

"Whereas the said party of the second part is the owner of a certain judgment dated July 25, 1900, for the sum of Nine Hundred Ninety Dollars ($900.00) against said B. E. Brooks, and whereas one C. W. Hahl of the State of Texas claims to be the owner of a tract of land situated in Harris County in the State of Texas, described as follows, to-wit: (Description of property.)

"And whereas various lawsuits are now pending in relation to the title of said land and the right of the party of the second part to a portion of the judgment in the case of Brooks

against Hahl and being desirous of settling said matters said Craig is about to enter into an agreement with said Hahl to pay said Hahl the sum of Three Thousand Dollars ($3000.00) and to satisfy said judgment against the said Hahl, also to pay said B. E. Brooks the sum of One Thousand Dollars ($1000.-00) for his interest in said land.

"Now therefore the said party of the first part for and in consideration of the agreements of the second party hereinafter contained and set forth to be done and performed, does hereby agree and contract to execute a note for the sum of Four Thousand Dollars ($4000.00) to said party of the second part, due in one year with 7 per cent interest, together with a mortgage upon the land herein described, and to undertake the sale of said land on the best terms that he can get, and out of the proceeds of said land first pay to said party

of the first part the sum of Four Thousand Dollars ($4000.00) so advanced, together with seven per cent interest thereon, and any amount received in excess of said Four Thousand Dollars ($4000.00) and interest at the time of the sale to be divided between the party of the first part and the party of the second part as follows: Said party of the first part shall receive 75 per cent (75 pct.) and the party of the second part shall receive twenty-five (25 pct.) per cent thereof with interest thereon at the rate of 7 per cent from the date of this

Page 2

contract and until said party of second part shall receive the sum of One Thousand Dollars ($1000.-00) and interest from the date of this contract then the sum of Two Hundred Dollars ($200.00) shall be paid B. E. Brooks with seven per cent interest from the date of this contract, then said amount shall be divided on the basis of 75 per cent and 25 per cent as above until party of the second part shall receive the sum of .....Dollars, then all claim and demand of the party of the second part shall cease and said party of the first part shall have all the proceeds of said land over and above said amounts, and said party of the second part for and in consideration of the undertaking and agreement on the part of the party of the first part herein above stipulated and agreed, agrees to loan the said party of the first part the sum of Four Thousand Dollars ($4000.00) due in one year with seven per cent interest, and further agrees that in case said land is not sold in that time to renew said note for a like period, and further agrees that in case said land is sold at any time prior to the maturity of said note that it may be paid and the interest shall cease, and further agrees to release all claims against B. E. Brooks and satisfy the same on the records of Coles County, and to dismiss a certain suit in chancery now pending against said B. E. Brooks at its costs.

Page 3

"This agreement is made conditional upon the said Craig being able to procure from the said Hahl a fee simple title to the land herein described, free and clear of all encumbrances, and in case that said Craig shall

not be able to do that, then this contract is to be null and void and of no effect."

Appellee filed its bill in chancery in which it is averred that on November 12, 1906, appellant sold 200 acres of the land in question to one George W. Hogue for $5,175.00 and afterwards sold the balance for $8,000.00 and took notes for part of the purchase money; that appellant has refused to account, under said contract with appellee, and prays that he may be decreed to account for the moneys received from the sale of said land and to pay whatever is found due appellant under said agreement and for general equitable relief.

It is first contended by appellant that a court of equity is with jurisdiction for the reason that the contract does not create a trusteeship in appellant and that, if he owes anything to appellee, it is in the nature of a simple debt. We agree with appellant that the title to the lands purchased vested in him. He purchased the lands with his own money borrowed from appellee to secure which he gave his notes and a mortgage and has paid to appellee his obligation. Appellee,

however, had an interest in a share of the profits, and the parties to the contract in regard thereto stood in the relation of partners. Smith vs Gear, 59 Ill. 381; Morrill vs Colehour, 82 Ill. 618; Roby vs Colehour, 135 Ill. 300; MacDonald vs Dexter, 234 Ill. 517. Equity always has jurisdiction to order an accounting between partners.

The order of reference to the Master in Chancery directed him to take and report proofs only. He made no findings of either law or fact. The Chancellor heard the cause upon the reported proofs. The Master, who heard and saw the witnesses did not pass upon their credibility and made no findings of fact. The Chancellor neither heard nor saw the witnesses and could not pass upon their credibility. In this court, we have nothing to guide us on this question. The transactions between the parties involve numerous items extending over several years. The principle contention between the parties was as to the true amount received by appellant from the sale of a portion of the premises and this involved the execution and payment of numerous notes. The universal rule in chancery pract-

ice is that the Chancellor shall first determine whether there is a right to an accounting from the evidence adduced before him for that purpose. If the right to an accounting is established, an interlocutory decree should be entered to that effect and the matter referred to the Master to state the

account. Barnes vs Barnes, 282 Ill. 593. In the case cited, it was held that the duties of the court, the public interest and the rights of litigants forbid the examination by the court of intricate accounts. Especially would this be true where neither the Master nor the Chancellor had an opportunity of passing upon the credibility of the witnesses. Such an account cannot be stated by the Court even by agreement of the parties. Barnes vs Barnes, **supra,** and cases cited therein.

The decree is reversed and the cause remanded with directions to proceed in conformity with this opinion.

568a

Gen. No. 6940. OCTOBER TERM A. D. 1918. Ag. No. 13

The People of the State of Illinois.
Defendant in Error,

vs.

214 I.A. 649

Walter Haxton, Plaintiff in Error.

Writ of Error to County Court Morgan County.

ELDREDGE J.

Plaintiff in error was convicted under an information charging him with selling intoxicating liquor in anti-saloon territory filed by the State's Attorney of Morgan County. The information is not sworn to. A motion to quash the information was made and overruled. For the reason that the information was not sworn to, the motion to quash the same should have been sustained. People vs Clark, 280 Ill. 160.

The judgment of the County Court is reversed.

369a

Gen. No. 6946. OCTOBER TERM A. D. 1918 Ag. No. 16.

Estate of POLLY DUNHAM, Appellee,

vs.

Estate of ABRAHAM STEPHENS, Appellant

Appeal from Circuit Court, McLean County.

ELDREDGE J.

This case is now before us for the third time. The two prior opinions of this Court, to which references is hereby made, contain statements of all the facts and issues involved. Dunham vs Estate of Abraham Stephens, 190 Ill. App. 514; Dunham vs Estate of Abraham Stephens, 205 Ill. App. 27. On the last appeal, the decree was reversed and cause remanded with directions and the trail court entered a decree in conformity with the mandate of this court. The former decisions are **res ad judicata** in this court of all questions involved and the decree of the Circuit Court is therefore confirmed.

214 I.A. 650

370a

Gen. No. 6953. OCTOBER TERM, A. D. 1918. Ag. No. 22

MURRAY BROS. & WARD LAND COMPANY,
Appellant,

vs.

MARY E. WOODROW, Appellee.

214 I.A. 650

Appeal from Circuit Court, Coles County.

ELDREDGE J.

This is, apparantly, an appeal from the judgment of the Circuit Court of Coles County rendered in favor of appellee after the Court had sustained appellee's demurrer to the replications to the sixth, ninth and tenth additional pleas and appellant had abided by its replications.

The record in this case consists of, first, a placita and then what purports to be copies of all the Court files in the case. These are followed by a placita for the October Term, 1916, after which appears what is apparently a copy of the minutes on the Clerk's docket. A placita for the January Term, 1917, follows with a series of court orders after which appears a placita for the January Term, 1918, another series of court orders and an appeal bond and finally the certificate of the clerk that the foregoing is a true, perfect and complete copy of the record in the case. There is nothing in the record to show that any suit was, in fact, ever instituted in said court or that

any declaration, summons, pleas, replications or demurrer were ever filed in said cause. There is nothing in the record from which we can determine whether the judgment of the court was right or wrong and, for this reason, it must be affirmed.

571 a

Gen. No. 6959. OCTOBER TERM A. D. 1918. Ag. No. 25

W. T. DODSWORTH, Appellee,

vs.

J. C. ~~HENDERSON~~, Appellant.

Appeal from Circuit Court Morgan County.

ELDREDGE, J.

214 I.A. 650[3]

This is an appeal from a judgment in favor of appellee rendered in a suit of forcible detainer in which appellee sued appellant for the possession of certain premises located in Morgan County. The suit was commenced before a Justice of the Peace where a judgment was rendered in favor of appellant. On appeal to the Circuit Court the judgment was rendered in favor of appellee.

Appellant is a farmer and took possession of the farm March 1, 1914, under a written lease with Lewis Roberts, guardian of Ruby K. Dodsworth. The lease was for the term of one year from the first day of March, 1914, to the first day of March, 1915, but contained the following covenant:

"And it is further covenanted and agreed between said parties that the lessee shall have the privilege of extending this lease on the same terms and conditions as herein expressed and at the same rental from year to year, for the period of one, two or three years from the first day of March, 1915."

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Appellant remained in possession of the premises under this lease from March 1, 1914, until March 1, 1918. Appellee claims right of possession, under a lease from said Roberts, guardian, executed April 26, 1917, and purporting to lease the farm from March 1, 1918, to March 1, 1919.

On March 1st, 1918, appellant did not vacate the premises and claims the right of possession on the theory, that, for the three years from March 1st, 1915, to March 1st, 1918, he was holding over as a tenant from year to year and having held possession after March 1st, 1918, he was entitled thereto for the year ending March 1st, 1919. In other words, he claims that the lease, by its terms, terminated March 1st, 1915, and not having exercised his privilege under the option,

he became a tenant from year to year after the expiration of the first year and that it thereafter required sixty days notice to terminate his tenancy. It is the contention of appelle that appellant held possession of the farm for the years mentioned in accordance with the terms of the lease which terminated on March 1, 1918, at which time, he was bound to surrender possession of the premises without notice. The trial court adopted the latter view which, in our opinion, is correct. The option in the lease provides that the lessee shall have the privilege of extending the same on the same terms and conditions and at the same rental from year to

year for the period of one, two or three years from the first day of March, 1915. He exercised that priviledge from year to year until the first day of March, 1918, when the lease, by its terms, terminated and he was in duty bound to deliver up possession without notice.

The judgment of the Circuit Court is affirmed.

572a

Gen. No. 6968. OCTOBER TERM A. D. 1918 Ag. No. 31

FIRST STATE BANK, Appellant

vs.

CHARLES H. WERNER, Appellee

Apepal from Circuit Court Sangamon County.

ELDREDGE J.

214 I.A. 650 4

Appellant, at the November Term, 1917 of the Circuit Court of Sangamon County, filed a narr and cognovit and caused a judgment by confession to be rendered against appellee for the sum of $354.81 upon an instrument, a copy of which is as folows:

"LIVE STOCK REMEDY CO.

St. Louis, U. S. A., June 25th, 1917.

Please ship C. H. Werner at Curran, Ill.,

1000lbs. Lion's Stock Remedy at 30 cents per lb. 5 gallons Lion's Oil at $1.00 per gallon. Junior Force Pumps at$.....each.....10 ft. No. 20 Galvanized Oil Tank at.....each. 1 Lion's Ball Hog Oilers at $10.00 each. All F. O. B. Company's shipping stations, for which I promise to pay Live Stock Remedy Co., or order, on arrival of goods.

P. O. Address Curran, Ill.

AGENT: Roland De Witt.

Purchaser Curran, Ill. P. O.

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(No agreements or contracts, other than appearing hereon, considered by company. Not subject to countermand.)

$315.00 June 25, 1917.

Ninety days after date, for value received I promise to pay to the order of Live Stock Remedy Co. Three Hundred and Fifteen Dollars.

With 7 per cent interest from date if not paid at maturity, and 10 per cent attorney's fees, and to secure the payment of said amount, I hereby authorize, irrevocably, any attorney of any Court of Record, to appear for me in such Court in term time or vacation at any time hereafter and confess a judgment, without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, whether due or not, together with costs, and waive and release all errors which may intervene in any such proceedings and to consent to immediate execution upon such judgment; hereby ratifying and confirming all that my said Attorney may do by virtue thereof.

(Signed) C. H. WERNER

Payable if desired at ....."

The endorsements on the back were as follows:

"Live Stock Remedy Co. without recourse Roland De Witt."

On motion of appellee, the judgment was opened up and he was given leave to plead on the ground that the execution of the purported note was procured by fraud and circumvention. Immediately after the court ordered the judgment opened up and granted appellee leave to plead, appellant obtained leave to amend its declaration. This amendment consisted of filing the common counts as additional counts to the original declaration. Preceding and attached to the common counts is the following:

"First State Bank (of New Berlin) a corporation,

Plaintiff in this suit by Chapin & Chapin its attorneys now amends its declaration after leave of Court first had and

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obtained by adding the following additional counts.

The plaintiff avers that it is the assignee of the chose in action hereinafter described. That it purchased the same from the Live Stock Remedy Company on the 26th day of June, 1917, by payment to said Company of Three Hundred and 80-100 ($300.80) Dollars, and that plaintiff is now the actual bona fide owner thereof.

FOR THAT WHEREAS heretofore on the 25th day of June 1917 at New Berlin in the County of Sangamon in the State of Illinois, in consideration that the plaintiff's Assignee at the request of the defendant would deliver to the defendant the following described goods, wares and merchandise, i. e.,

1000 pounds Lion's Stock Remedy at 30c per pound; 5 gallon Lion's Oil at One Dollar per gallon; 1 Lion's Ball Hog Oiler at $10.00, the defendant agreed to pay to the said Live Stock Remedy Company $315.00 and thereupon the Live Stock Remedy Company confiding in and relying upon the said promise of the said defendant delivered to the said defenant the said goods, wares and merchandise."

The common counts instead of being signed by appellants attorney are signed as follows: "First State Bank, by J. F. Horn,

Page 3

Cashier First State Bank." The following jurat also appears "Subscribed and sworn to before me this .....day of February, A. D. 1918. W. M. Pfeffer, Notary Public." Appellee filed pleas alleging that the execution to the purported note was procured by fraud and circumvention. Appellant in the court below insisted that this instrument was a promissory note and the trial court adopted that theory. While appellant has assigned numerous errors, the one that the verdict is contrary to the evidence is the only one presented to us to consider in its brief and argument and the others are therefore waived.

The fiirst, and the more prominent, part of the instrument sued on appears to be an order for certain goods. Below the order form and printed in small type appears a most drastic form of judgment note. Appellee signed the instrument but once and that at the end.

If this instrument be deemed a simple contract and non-negotiable, then appellant cannot recover thereon in this suit for the reason that it has not complied with Section 18 of the Practice Act, which provides: "The assignee and equitable and **bona fide** owner of any chose in action not negotiable heretofore or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual **bona fide** owner thereof, and set forth how and when he acquired title; but in such suit there shall be allowed all just set-offs,

discounts and defenses, not only against the plaintiff but also against the assignor or assignors, before notice of such assignment shall be given to the defendant." There is no proper verification of the additional counts because there is nothing to show who, if anybody, swore to the truth thereof. A declaration signed by a corporation with merely a jurat attached in the form appearing here does not make it a verified pleading. Steele-Wedeless Co. vs Shoodoc Pond Packing Co., 153 Ill. App. 576; Rogers vs Pierece, Ill. App. Also in the statement above quoted, it is averred that plaintiff's "assignee" at the request of the defendant would deliver to the defendant the

following described goods, etc., The use of the words "assignee" instead of "assignor" may have been a typographical error, but when a party's right of action depends upon a pleading under oath, it should be accurate.

Upon the question of fact whether the execution of this promissory note was obtained by fraud and circumvention, there have been two trials before a jury On the first trial the jury failed to agree on a verdict, and on the second trial, it found its verdict in favor of appellee Appellant had the case tried in the court below upon its own theory that the instrument in question was a negotiable promissory note and the jury were fully instructed upon that theory upon all the issues involved. The evidence for appelllee tended to show that he thought he was signing only an order for the goods mentioned; that he

could not see very well without his glasses and requested the agents of the Live Stock Remedy Company to read it to him; that said agents did not read that part purporting to be a judgment note; that he was assured by said agents that the instrument was but an agency contract; that he would not have to sell the goods, but that they, or one of them, would do the selling, and that all that appellee would have to do would be to introduce them to the farmers in the neighborhood; that at the time they appeared at his home he was in the act of hitching up a team of young restive horses preparatory to going into the field to plow corn; that he had signed orders for stock food before for his own individual use similar in appearance and form to the one in question except that they did not contain judgment notes; that he had no knowledge that he had signed a promissory note until judgment was rendered against him.

Whether appellee was induced to sign this instrument through fraud and circumvention and whether, in doing so, he exercised that degree of diligence which the law requires, were questions of fact for the jury to determine and it was fairly instructed on these questions. The verdict is not contrary to the clear and manifest weight of the evidence and the judgment is affirmed.

573a

Gen. No. 6971. OCTOBER TERM 1918. AG. No. 34.

OSCAR CRANE, Appellant,

vs.

WILLIAM HERATY, Appellee.

Appeal from Circuit Court Greene County.

ELDREDGE, J.

214 I.A. 650 5

Appellant brought a suit in replevin before a Justice of the Peace to recover the possession of a hog from appellee. The case was heard by a jury before the Justice and a verdict returned in favor of appellee. Appellant thereupon took an appeal to the Circuit Court of Greene County where the case was again tried and a similar verdict returned. Several witnesses including appellant went to the farm of the witness John Robinson one day to look at some pigs, which, it was claimed, were of the same litter as the hog in controversy. On the cross-examination of this witness by counsel for appellant the following questions and answer appear in the record:

"Q. Didn't you refuse to show the hogs to him?

A. I didn't refuse.

Q. Why didn't you then?

A. Because I didn't want to.

Q. Why didn't you want to show them those pigs?

A. I didn't want to get mixed up with it. Crane took hogs once before.

Page 1

He taken six hogs once before that didn't belong to them and I didn't want to get into any more trouble with them."

Counsel for appellant objected to the last answer, disclaimed the same and moved that it be stricken out, which motion was overruled. The action of the court in refusing to allow the disclaimer and in overruling the motion to strike out the answer is urged as error. The question directly calls for the reason why the witness did not care to show appellant the hogs. When a party litigant asks a witness to tell his personal reasons for a certain course of action pursued by him, he cannot disclaim the answer on the ground that the reason is not well founded or that it is prejudicial to the interests of the party asking the question.

Counsel for appellee in his opening statement to the jury menitoned the fact that this case had been tried before a Justice of the Peace and the verdict there rendered had been in favor of appellee. An objection was made to this remark and was sustained by the court, who directed the jury to give such statement no consideration whatever. While it was improper for the counsel to inform the jury of the result of the former trial, the Court promptly sustained the objection thereto and admonished the jury to give it no consideration. We

are of the opinion that in the present case this should not cause a reversal of the judgment.

The judgment of the Circuit Court is affirmed.

374

Gen. No. 6978. OCTOBER TERM, A. D. 1918. Ag. No. 40

WILLIAM COUNCIL, Appellant

vs.

THOMAS E. LYON and W. W. SHELLY, Appellees

Appeal from Circuit Court Sangamon County.

ELDREDGE J.

214 I.A. 651

Appellant brought this suit in trover in the Circuit Court of Sangamon County against appellees for the conversion of a primissory note for the principal sum of $750.00 executed by appellant and payable to the order of appellees six months after date with interest at 6 per cent per annum. The first trial resulted in a disagreement of the jury. On the second trial a verdict was rendered in favor of appellees.

Appellant is a farmer and the appellees are attorneys-at-law. On January 3rd, 1916, appellant, for himself and, on behalf of such stockholders of the Gazelle Mining Company as might be similarly situated as appellant, entered into a written contract with appellees for the purpose of retaining the latter as his counsel to represent him in litigation then contemplated in regard to the affairs of the Gazelle Mining Company. By this contract appellant agreed to pay appellees $1,000.00 as a retainer fee and to further provide for the use of appellees for the purpose of the litigation a sufficient fund for the payment of

any and all expenses connected therewith. Appellant thereupon paid to appellee on the retainer fee $250.00 in cash and executed the note in question for the balance. Appellant claims that on or about April 18, 1918, he was called to the office of appellees and there informed by one of them that they desired him to execute three smaller notes for $250.00 each in place of the $750.00 note, which appellant consented to do and that appellant then executed one note for the principal sum of $250.00 payable to the order of appellee Lyon, a similar note payable to the order of appellee Shelly and the other note payable to the order of Lyon and Shelly. He also testifies that after he had executed these three notes for the principal sum of $250.00 each, he asked for the return

of the $750.00 note and was informed by Shelly that it was locked up in Lyon's desk and he could not get to it, but that it would be sent to him by mail as soon as Mr. Lyon came. Subsequently appellees sold the $750.00 note to Charles P. Summers, who presented it to appellant and the latter paid it by paying $100.00 in cash and executing a new note to Summers for $650.00 The $750.00 note when executed bore the date "Jan. 3d." When presented to appellant by Summers for payment it bore the date "June 3d." Appellant claims that this note was altered without his knowledge or consent by appellees for the purpose of extending the date of its maturity so that it could be assigned to a **bona fide** holder in due course. Appellees denied that

, the three $250.00 notes were executed by appellant to take the place of the $750.00 note, but claim they were executed by appellant so that they could negotiate the same and thereby raise funds for the expenses of the litigation, and in corroboration of this contention on their part they offered in evidence a contract bearing date June 23d, 1916, and known as defendant's Exhibit 2. This contract is as follows:

"This Memorandum of Agreement entered into the the 23rd day of June, 1916, Witnesseth:

THAT WHEREAS, Avon Chenswold, of Athabasca Landing, Canada, is about to institute in the United States Court in such jurisdiction or jurisdictions as his counsel may deem proper, for the purpose of recovering possession of certain mining properties in the State of Arizona, known as the Gazelle Mine; and,

WHEREAS, The said action contemplated is to be brought by the said Chenswold on his behalf and in the behalf of other stockholders similarly situated; and,

WHEREAS,The parties signing this agreement are of that class and the signing parties are anxious for the purpose of protecting their interest in the propsed litigation to co-operate with the said Chenswold in the employment and payment of his counsel, Thomas E. Lyon and W. W. Shelly, attorneys and solicitors at Springfield, Illinois; and,

WHEREAS, Some of the larger stockholders, viz., William H. Council, M. M. Brassfield, George Council and others, have heretofore evidenced their inclination to co-operate with the said Chenswold and the signers of this contract, and to that end have agreed to contribute to the expense and compensation of counsel for Chenswold, for the purpose of protecting their interests.

THEREFORE, Upon consideration of the premises, the signers of "the class" have agreed and bound themselves to contribute to the payment of the expenses and the attorney's fees of the said Lyon and Shelly incident to the prosecution of the propsed suit in the name of

Avon Chenswold and other stockholders similarly situated and to that end, they each for themselves agree to contribute and to pay into the hands of Lyon and Shelly for the purpose of the protection of the stock of the parties signing this agreement, five per cent of the first cost of the stock respectively held by them in the said Gazelle Company, as and for a contingent fund to be used by the said Lyon and Snelly in defraying expenses incident to the proper prosecution of the propsed cause of action or any other cause of actions that the said counsel may deem pertinent for the purpose of protecting the signers' interests, and that any excess over and above the defrayal of the incidental expenses shall by the said counsel be applied upon their fees incident to the service, and in addition thereto, the

signers agree and bind themselves to contribute pro rata upon the conclusion of the litigation to the payment of such a reasonable fee as may be determined by the Court or Courts having jurisdiction of the said cause or causes and rendering their final judgment therein.

In consideration of the premises and undertakings of the contracting parties herein denominated the signers, Lyon and Shelly assume and bind themselves to the faithful and diligent prosecution of such suit or suits as may be or become necessary in the protection of the interests of the stockholders of the class signing this agreement, and further they bind themselves to the diligent and faithful effort to recover the property in controversy.

Each of the parties hereto having read and knowing the contents of this agreement, have this day executed the same for the uses and purposes therein set forth, and the signers have caused to be set opposite their names the amount of shares of stock respectively held by them, together with the notation of the amount of money this day paid into the contingent fund in the hands of Lyon and Shelly, of Springfield, Illinois.

Names and Address	Number of Shares	Amount paid
Wm. Council, Williamsville, Ill	112,000	$20,000.00
Anne E. Council, Willimsville, Ill	100.000	$20,000.00
M. M. Brasfield Auburn, Ill	23,400	10,340.00
Jane Junks, Hudson	25,025	5,000.00
O. S. Nash, Sharpsburg	4,000"	

When this contract was first offered in evidence appellant, by his counsel, objected to it on the ground that it bore a date subsequent to the date of the three $25.00 notes and therefore said notes could not have been executed for the consideration of the payment of appellant's share of the expenses provided for by said contract. The testimony of appellees tended to show that this contract was in existence at the time said three notes were executed, but was undated; that several parties had to sign the contract and that it was not until after they had

all signed it that the date was inserted therein. During the controversy between

counsel for the respective parties on the trial over the competency of this contract, the court stated in the presence of the jury, "Well, the date don't prove very much; just proves that is the date of the paper, that is all." And again remarked, "The date does not show when it was made at all." A contract is presumed to have been executed upon the day of its date and the burden of proof is upon the party alleging that it was not so executed upon that day. City of Paxton vs Bogardus, 201 Ill. 628. If this contract was not, in fact, in existence until June 23, 1916, then it could not have executed by appellant at the time the three $250.00 notes were executed by him and such fact if proven would tend to support appellant's theory that said last mentioned notes were not executed by him to secure the payment of his share of the expenses of the litigation, but were, as he claimed, executed to take the place of the $750.00 note. Appellee also testified that the change in the date of the $750.00 note was made by them with the consent of appellant and in his presence.

The statements of the court above quoted deprived appellant of the presumption of law to which he was entitled, was an opinion of the court upon the facts in the case and practically destroyed appellant's theory of his right or recovery. There was a sharp conflict in the evi-

dence in regard to the consideration for the execution of the three $250.00 notes and these remarks of the Court were highly prejudicial to appellants. That the trial court should not express his opinion on the facts during the trial of a case is elementary.

Some criticism is made of the instructions, but we find no reversible error therein nor in the rulings on the admission of evidence.

The judgment of the Circuit Court is reversed and the cause remanded.

575a

Gen. No. 6989. OCTOBER TERM, A. D. 1918. Ag. No. 49

ORIN CASE, by Abe Johnson, His Next Friend,
Appellee,

vs.

WALTER R. ANGER and THEODORE ANGER,
Appellants.

Appeal from Circuit Court DeWitt County.

ELDREDGE, J.

214 I.A. 651

This is a suit brought by appellee, a minor, by his next friend against appellants to recover damages received by appellee and his motorcycle on which he was riding at the time on account of a collision between the motorcycle and an automobile driven by appellants. The accident occurred on a public street in the village of Wapella, DeWitt County, on the afternoon of July 19, 1918. The declaration consists of three counts, the first being in trespass and the other two in case. Appellee recovered a verdict and judgment against appellants for the sum of $500.00. Third street in said village runs east and west and is intersected by Popular street which runs north and south. The accident happened at the intersection of these two streets. The proofs introduced on behalf of appellee tended to show that he was riding a motorcycle eastward along the south side of Third street and at the same time appellants with three other members of their family were riding

westward in an automobile on the same street. Walter R. Anger, appellant, and his son, Theodore Anger, appellant, were sitting on the front seat of the automobile. Theodore Anger was fifteen years of age and sat behind the steering wheel of the automobile and his father was teaching him how to drive and steer the car. In the center of the street intersections was a stone. The automobile, when it reached the intersection, turned south on Popular street. Instead of proceeding along the north side of Third street until the stone in the center of the intersection was passed and then turning south, Walter R. Anger, when the car reached the east side of the intersection, reached over, took hold of the steering wheel, which at that time

576a

Gen. No. 6899 APRIL TERM A. D. 1918. Ag. No. 72.

COMMISSIONERS OF LAKE FORK SPECIAL DRAINAGE DISTRICT, Appellants,

vs.

COMMISSIONERS OF HIGHWAY OF THE TOWN OF LAKE FORK, Appellee.

Appeal from the Circuit Court of Logan County.

Opinion by Waggoner, J.

214 I.A. 651

The appellants brought an aciton, in debt, against appellees for the collection of certain drainage assessments levied against the highways of Lake Fork Township. The first suit was brought to recover assessments for the years 1909 and 1910 amounting to $450.-00, and afterwards a second suit was brought to recover the assessment for the year 1911 amounting to $205.-88. By agreement of parties the two causes were consolidated and tried as one. A jury was waived, and the case heard before the court. The court found for the appellees and rendered judgment against the appellants for the costs from which they have appealed.

The drainage district includes certain lands lying in the townships of Lake Fork, Mt. Pulaski and Elkhart in Logan County, and was organized as a special drainage district under section 49 of the Farm Drainage Act, being paragraph 124 of chapter 42, Hurd's Revised Statutes of 1917.

Appellants claim the court erred (1) in admitting evidence offered by appellees to prove that the highways in question were not benefitted; (2) in admitting evidence offered by appellees to prove that the meetings of the drainage commissioners were held o utside the territorial limtis of the district, and (3)) in finiding for and rendering judgment in favor of the appellees.

In the view we take of the case it is not necessary to pass on any question other than that arising on account of the meetings of the drainage commissioners having been held outside the territorial limits of the district.

A petition was filed in the County Court of Logan County on December 23, 1889, for the organization of a special drainage district and an order was entered by

the court June 19, 1890 organizing the Lake Fork Drainage District.

On March 4, 1905, the commissioners of the drainage district received a petition to enlarge the boundaries of the district, and on April 15, 1905, entered an order enlarging the boundaries. On February 2, 1906, the drainage commissioners, believing that the highways would be benefitted by enlarging and deepening the channel, estimated the benefits to the district at $120,000, and to the highways in Lake Fork Township at $3,000, and filed their classification February 5, 1906,

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with the county clerk. Notice of said classification was given, objections heard and the classification confirmed February 23, 1906. On December 12, 1906, the drainage commissioners estimated the costs of the improvement at $70,000, and assessed said sum against the property in the district, and afterwards on December 8, 1908, said sum being insufficient, an additional sum of $12,000, was assessed to complete the work.

The meetings of the drainage commissioners were held outside of the territorial limits of the drainage district. Most of the meetings were held in the Village of Mt. Pulaski, and all the meetings were held either at the County Clerk's office, in Lincoln, or in the Village of Mt. Pulaski.

Official power does not ordinarily attend the person of the officer, but must be exercised in the territory where he is an officer. People v. Anderson, 239 Ill. 266, (8-9).

"Drainage districts are local subdivisions of the State created by law for the purpose of administering therein certain functions of local government, and the commissioners exercise a portion of the sovereign power of the State, being invested with the taxing power, the power of eminent domain and other functions of local government. It is the rule that officers of such local subdivisions are confined in their jurisdiction to the territorial limits of the municipality or district.

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Counsel do not deny that such is the rule, or contend that a City Council, or other body exercising the powers of government in a district or municipality, could hold a meeting or perform any functions outside of the limits of the municipality or district, but it is contend-

ed that drainage districts ought to be exempted from the rule. We do not discover any sound basis for such a distinction, and have held that the rule applies to the commissioners of a drainage district in the cases of People ex rel. v. Carr. 231 Ill. 502, and People ex rel. v. Schwank,237 Ill. 40. The fact that notices may be posted in or near the drainage district has no bearing on the question where corporate powers may be exercised. There is direct authority in the act for giving notice in that way, and as the object is to give notice, which must be by posting in public places, there might be no public places within the district. The act authorizes the clerk to keep the records in his office, wherever it may be in the township; but that fact is of no importance in determining where the commissioners may hold their meetings. It can make no difference as to the legality of an act whether a meeting is held three-quarters of a mile from a district or at a greater distance, and if a meeting could be held for the organization of this district outside of the district, it could be held at any remote point in either township." The People v. Helper, 240 Ill. 196, (199-200).

In the case of the People v. Camp, 243 Ill. 154(155) the

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court said, "The evidence showed that all the meeting of the commissioners had been held at the town hall, which was about three-quarters of a mile outside the district. We have held recently that the powers of drainage commissioners are confined to the territorial limits of the district and must be exercised within its boundaries. People v. Carr, 231 Ill. 502; People v. Schwank, 237 Ill. 40; People v. Anderson, 239 Ill. 266; People v. Helper, 240 Ill. 196."

The powers of drainage commissioners are confined to the territorial limits of the district and must be exercised within its boundaries, and an assessment levied at a meeting held outside the district is void. The People v. Larson, 282 Ill. 501, (503).

It is true that there are several kinds of drainage districts provided for in the Farm Drainage Act. The first are wholly within one town; the second, union districts in two towns; the third, special drainage districts within three or more towns. Commissioners of Sub-

districts v. McNulta, 242 Ill. 461, (464). It is also true that section 60 of the Farm Drainage Act (Par. 135 Hurd's Statute of 1917) provides that in the case of special drainage district the meetings of the drainage commissioners to hear the objections to the classification shall be at the court house of the county in which the district was organized, unless the commissioners shall for conveninece of persons interested

designate some other place. This provision allows the holding of such meeting outside the territorial limits of the district, but there is no statutory authority permitting the holding of any other meeting outside the territorial limits of the district. The general rule is that the meetings must be held in the district, and authority to hold one meeting outside the district should not be construed as authorizing the holding of all meetings outside the district.

Affirmed

Judgment ~~Reversed.~~

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Gen. No. 6910 ~~OCTOBER~~ April TERM A. D. 1918. Ag. No. 3.

ROBERT W. CAIN, Appellee.

vs.

214 I.A. 651

CARLINVILLE COAL CO., Appellant

Appeal from Circuit Court of Macoupin County.

Opinion by Waggoner, J.

The appellee, Robert W. Cain, was employed as a loader in appellant's coal mine. On Dec. 30, 1915, he had finished his day's work, and was en route to the bottom of the shaft to be hoisted from the mine. James Dyer was driving a mule hitched to two cars in which were riding appellee and six other men. The mine had been worked for more than thirty years, and the coal was originally hauled with mules. Three or four months before the accident, motors has been installed to haul the cars from the gathering points to the place from which it was to be hoisted. The cars weighed about one thousand pounds each, and had a capacity of about two thousand six hundred pounds of coal. The mules would pull from twelve to fifteen cars, but the motors would pull from thirty to thirty-two. There was in the mine a grade, of about three per cent known as the hill, about four hundred feet long. A motorman, just prior to the accident, was pulling thirty-one loaded cars up the hill, and just

as he got two cars over the crest, the drawbar, in the third car back of the motor, broke and twenty-nine loaded cars ran back down the hill. The mule and two cars, in one of which appellee was riding, were following a short distance behind the motor. When the twenty-nine cars went back down the hill they ran over the mule killing it. Appellee was caught between one of the cars and a prop, crushed and bruised severely, and was burned about the head and ears by electric wires.

The defendant had rejected the Workmen's Compensation Act. Appellee brought this action to recover damages for the injuries received. The first count of the declaration charges negligence in using a car with a drawbar and sills which were old and of insufficient size and strength to withstand the strain of drawing twenty-eight load-

ed cars attached thereto. The second count charges a willful violation of the Miners' Act by allowing quantities of gob to be and remain along the track and rib in the entry where the accident happened. The third count charges a failure to provide a swithcman or trip rider on the rear of the train or trip to stop any cars in the event they should break loose. The general issue was filed, and the case tried upon the issue so raised. The jury returned a verdict in favor of appellee for $5000.00, and after appellant's motion for a new trial was overruled, judgment was entered on the verdict, and an appeal was prayed and allowed.

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Appellant claims it was against the rules for appellee to follow behind the motor; that the rules required appellee to wait at the parting until the electric motor reached the bottom of the mine and the power was shut off and a signal given by means of turning out the electric ilghts. There is no evidence that appellee knew of any such rule, and no evidence that appellant promulgated any such rule so as to afford appellee a reasonable opportunity of knowing of it. The mere fact that the employer has adopted rules does not charge the employee with a knowledge thereof, so as to impute to him negligence with respect to conduct in violation thereof, and to relieve the employer from liability for injuries thus incurred. It is the duty of the employer to give notice of the existence of rules and to so promulgate them as to afford the employee a reasonable opportunity of ascertaining their terms. 20 Amer. & Eng. Enc. of Law, (2nd Ed.,) Pg. 102; 26 Cyc. 1160; Matthews v. New Orleans & Northeastern R. R. Co., 93 Miss. 325, 136 Am. St. Rep. 543; Fay v. M. & St. L. Ry. Co., 30 Minn. 231; approved by C. & W. R. R. Co. v. Flynn, 154 Ill. 448, (455).

Even if there was such a rule its abrogation may be shown by proof of its habitual violation, and there is ample evidence in the record of its habitual violation for such a length of time that the employer

Page 3

might reasonably have known of it. Hampton v. C. & A. R. R. Co. 236 Ill. 249 (254); Munter v. Moline Plow Co., 193 Ill. App. 261 (283).,Moreover if there was such a rule and

appellee had violated it such violation would have been but an act of contributory negligence or assumed risk by him of which appellant could not avail itself on account of having rejected the provision of the Workmen's Compensation Act.

Whether or not the drawbar was defective; whether or not there was debris at the side of the track in violation of the provisions of the Miners' Act, and whether or not there should have been a trip rider at the rear of the train to stop the cars in the event that any of them broke loose, were all questions of fact for the jury, and we find that there is ample evidence in this record to justify and support a verdict on each of the three counts of the declaration.

Appellant claims that the fifth instruction, regarding the habitual violation of the rule relative to following the electric motors out of the mine, should not have been given for the reason that there is no evidence on which to base it. We find from the record that that is ample evidence on which to base such instruction, and that appellant recognized it by securing an instruction numbered nineteen to be given covering the same matter. The rule is well established that a party cannot complain of an instruction given, when he has requested and had given one of a like character. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, (230); Villison v. Dering Coal Co., 156 Ill. App. 209, (214).

Complaint is made of the sixth instruction. While we do not consider it defective, yet if it was defective the same defect exist in

the eighth, ninth and eighttenth instructions given at appellant's request, and appellant has no right to complain of error in appelee's instructions when a like error appears in the instruction given at appellant'e request. West Chicago St. R. R. Co. v. Buckley, 200 Ill. 260, (263).

It is urged that the damages are excessive. Appellee was twenty-six years old when injured. He had been working for appellant eight or nine years and was earning from $85.00 to $100.00 a month. For a year and a half he was unable to do any work. He then worked a little on a farm, but was unable to do much. After two years he was still unable to return to his

work in the mine. The evidence tends to show a permanent injury. He was on crutches fifteen months and then used a cane several months. There was evidence of a rupture, and fourteen months afterwards one limb was smaller than the other. The damages are not excessive.

Judgment Affirmed.

578a

Gen. No. 6915. APRIL TERM A. D. 1918. Ag. No. 75.

JOHN ROBINSON, Appellee.

vs.

SARAH E. GOWLING, Appellant.

Appeal from Circuit Court of Greene County.

Opinion by Waggoner, J.

214 I.A. 651

This is an action brought by appellee against appellant and her husband, J. E. Gowling, to recover $62.75 for hauling sand and gravel and for mowing weeds in the orchard on the farm of appellant. J. E. Gowling was the agent of his wife in the matter of renting her farm. At the conclusion of the evidence the suit was dismissed as to J. E. Gowling. The jury returned a verdict against Sarah E. Gowling in favor of appellee for the amount he claimed, judgment was entered thereon, and appellant appealed.

The evidence shows that the father, Richard R. Robinson, together with appellee's mother, on Sept. 1, 1916, entered into a written lease, with appellant, for the farm on which the mowing was done, and to which the sand and gravel was hauled, and moved upon such farm. By one of the terms of the lease appellee's father and mother agree to haul all material and to board men free of charge while improving said farm. Appellee lived on his own farm, near

which was a creek with sand and gravel in it, about a mile and a half from appellant's farm. Appellee testified that J. E. Gowling employed him to haul sand and gravel to be used in making some improvements on the farm leased to his (appellee's) father and mother; that the price to be paid was $1.25 per load; that he hauled fortynine loads; that, by reason of employment of J. E. Gowling, he mowed weeds in the orchard on said farm, charged $1.50 for so doing, and that after the work was done J. E. Gowling promised to pay him for the work.

J. E. Gowling testified that what business transaction he had about hauling the sand and gravel was with the father, Richard Robinson, and denied employing appellee to do the work; denied ever having had anything to do with appellee in regard to it and with prom-

ising to pay him for such work. The evidence shows that appellee while living on his own farm, was working for his father when this work was being done. J. E. Gowling testified that the father, when appellee was present, said he would rather haul the sand from the creek because appellee could bring a load every day when he came from there to work, and that if he went to Carrolton after the sand he would have to make a trip on purpose to get it. There was some litigation between Richard Robinson and the Gowlings. J. E. Gowling

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testified that after suit was brought, by Richard Robinson, appellee came to him (Gowling) and asked what he was going to do about the sand and gravel he (appellee) had hauled. Gowling says he told appellee he had never hired him to haul sand and gravel; that his father was to haul everything free of charge under the terms of the lease.

Appellee was corroborated in some respects by his father and brother, but it is not claimed that anyone heard an agreement in regard to hauling the sand and gravel or mowing the weeds in the orchard.

Edward Nelson, a contractor living in Jerseyville, testified that he was at Gowling's looking over some contemplated work; that Richard Robinson was there; that he (Nelson) asked Gowling where he expected to get the sand; that Gowling said * * * * he would have to have it shipped from Alton; that Robinson said * * * * there was plenty of good sand in the creek or branch close; * * * * that his son lived over there and could bring a load as he came back and forth, and that Robinson made the sugestion about getting the sand from the branch.

Appellant testified that she had a conversation with Richard Robinson in reference to hauling the sand, in which Robinson said that Gowling wanted him to haul sand from town, but he (Robinson) had persuaded Gowling to get it out of the branch; that he had told Gowling it was just as good sand and that he (Robinson) would rather haul it

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from the branch than to haul it from town. Appellant further testified that

she did not give her husband authority to employ any person to haul sand or gravel on her place, other than the contract or agreement about hauling material in the lease, and that she did not authorize anyone, as her agent, to make any contract different from that contained in the lease.

Edward Saunders was called by appellee as a witness, and testified that he was a bricklayer working for Gowling; that he saw appellee hauling sand and gravel that was used for patching, plastering and brickwork where Richard Robinson lived. On cross examination this witness stated that appellee did not haul right along and was them asked if it was not true that appellee worked on the place, and that when he came to work from the place where he lived he would bring a load of sand and gravel. To this question appellee interposed an objection, which was sustained. The purpose in asking this question and the answer expected was apparent. It was an effort to corroborate the testimony of Edward Nelson. We think the question was proper and should have been answered.

Appellant's contention was that the hauling was done by appellee as he came to his work, and thereby saved his father from having to go to Carrolton for sand and gravel, as testified to by

Edward Nelson. Appellee claimed such was not the fact, but that the hauling was done in pursuance of an employment by J. E. Gowling.

Appellee admits that he knew the terms of the lease between his father, mother and appellant. If the claim made by appellee, in this case, is true, then he was employed to haul forty-nine loads of sand and gravel at $1.25 per load, amounting to $61.25, notwithstanding the fact that appellant had a lease, the terms of which required the lessees to haul all material and board men free of charge while improving the farm.

The court gave to the jury, on behalf of appellee, the following instruction:

> You are further instructed that if you believe from a preponderance of the evidence in this case that the defendant, J. E. Gowling, was t he agent for the defendant, Sarah E. Gowling, in the management and improvement of her farm during all the time the services in controversy were performed, and if you furth-

er believe from a preponderance of the evidence in this case, that the said J. E. Gowling admitted to the plaintiff that there was due and owing the plaintiff the sum of $61.25 for the hauling of 49 loads of sand and gravel, and the sum of $1.50 for the mowing of an orchard and promised to pay the defendant the said sums of money and the plaintiff agreed to accept the same, then you should find for the plaintiff on those items and assess his damages at the sum of $62.75.

This instruction was erroneous. The admission of an amount due appellee (if made) was made at a time long after the work was done, and neither such admission nor a promise to pay it would in any way be binding upon the defendant (appellant).

A rule that would allow an agent, after a transaction was closed, to admit away the rights of his principal, would be too danger-

ous to be tolerated. Ruling Case Law, Vol. 1, Pg. 510, Par. 50.

The admission of an agent are only evidence against the principal when they constitute a part of the res gestae. They must accompany the transaction in which the agent acted; that he stated at a subsequent time is not admissible.

Converse v. Blumrich, 14 Mich. 109; 90 Am. Dec. 240.

Lowden v. Wilson, 233 Ill. 340 (348).

Summers v. Hibbard & Co., 155 Ill. 102 (112).

The jury were further instructed "that it does not necessarily follow that a plaintiff has failed to establish his case by a preponderance of proof because he has testified to a state of facts, which are denied by the testimony of the defendant; that in arriving at the truth you have a right to take into consideration * * * * their statements to third parties in relation to the matter in question, as well as their statements to each other in the presence of third parties," etc. There is nothing to base several parts of this instruction upon. The defendant (appellant) did not testify and deny a state of facts testified to by the plaintiff (appellee); there is absolutely no evidence of any statements made to each other when alone or in the presence of third parties, nor would the statements of appellee to J. E. Gowling, made long after the work had been done

be entitled to consideration by the jury.

The verdict of the jury was not supported by the

evidence. The court erred in not permitting the witness Edward Saunders to answer the question propounded to him, and in giving the two instructions above mentioned.

Judgment reversed and cause remanded.

Reversed and Remanded.

Denied 9-1919

(Certiorari denied)

579 a

Gen. No. 6921. APRIL TERM A. D. 1918. Ag. No. 66.

Springfield Consolidated Railway Company, et al, Appellee.

vs.

Jerry Burnett, et al, (Edward Holvey, Appellant)

Appeal from Circuit Court of Sangamon County.

Opinion by Waggoner, J.

241 I.A. 651

A bill was filed July 28, 1917, by the Springfield Consolidated Railway Company and the Springfield Gas and Electric Company praying for an injunction to restrain certain persons and all other from interfering with the property and management of the companies and from interfering with and molesting their employees.

A supplemental bill was filed and an injunction issued August 14, 1917, and served on a large number of persons and wide publicity given it.

On October 22, 1917, a petition was filed alleging the issuing of the injunction writ, its service and the publicity given it, and that on August 25, 1917, well knowing the existence of the writ Edward Holvey violated the injunction and became in contempt of court, in the manner set forth in the affidavit attached. Attached to the petition is the affidavit of Alexander Cass, a motorman employed by

the Springfield Consolidated Railway Company, that on August 25, 1917, while walking west on the north side of Monroe Street in Springfield, Illinois, near an alley just west of Fifth Street he was assaulted from behind and struck on the right side of the forhead with some blunt instrument which stunned him, knocked him over so he fell against an ice cream freezer standing on the sidewalk near the alley in front of the store of L. Bonansinga; that his assailant came from behind and ran immediately northward in the alley; that as a result of said assault affiant was incapacitated and unable to work for five weeks; that affiant is informed and believes his assailant was Edward Holvey and that upon the hearing he will be able to prove, by witnesses who saw and recog-

nized Holvey, that he was the assailant.

Appellant Holvey was served with process, appeared and moved to strike the petition and affidavit from the files. The court denied the motion, filed an answer denying the charges made against him and the evidence was heard by the court.

Appellees produced as witnesses Alexander Cass, John C. Stewart, Herman Tabor, Mrs. T. J. Hussion, and Carl E. Davis. Alexander Cass told of the assault which occurred August 25, 1917, at about twenty-five minutes of four o'clock in the afternoon, but did not know who did it. Carl E. Davis told of the publicity given the injunction.

John C. Stewart knew Edward Holvey, saw the assault and identified Holvey as the assailant. Herman Tabor and Mrs. T. J. Hussion saw the assault, and although they were not acquainted with Holvey both positively identified him as the man who made the assault. The three witnesses, John C. Stewart, Herman Tabor and Mrs. T. J. Hussion were wholly disinterested and not in anywise impeached.

The appellant denied the charge and produced as witnesses Isaac Robinson , Charles Wills, Fred Guy, Joseph Spies, William Kern, John T. O'Neil, J. W. Coy and David Merchant. Isaac Robinson and Charles Wills testified that Edward Holvey helped Isaac Robinson with some work on August 25, 1917, and was at Robinson's home from eleven o'clock A. M. to four forty-five P. M. Isaac Robinson, Charles Wills and Edward Holvey were close friends and all belong to the Fireman's Union. Guy, Spies, William Kern, John T. O'Neil, J. W. Coy and David Merchant all witnessed the assault, most of them knew both Alexander Cass and Edward Holvey, and they testified positively that the man who assaulted Alexander Cass was not Edward Holvey. Fred Guy and Joseph Spies were members of the Miner's Union, and were not riding the street cars, while J. W. Coy and David Merchant were striking street car men.

The court after hearing the testimony found appellant, Edward

Holvey, guilty of violating the injunction and ordered that he be sentenced to confinement in the county jail of Sangamon County for one hundred twenty days and that he pay the costs. Edward Holvey brings the case here by appeal.

Appellee entered a motion to strike the certificate of evidence from the record. In the view we take of the case it is unnecessary to pass on that motion.

Appellant questions the sufficiency of the petition and affidavit. We think the petition and affidavit sufficient. Courts of chancery have full power and authority to enforce their official mandates in a summary manner. To say otherwise would render them powerless and inefficient. The injunction was binding not only on the parties defendant to the bill, but also upon all persons who had actual notice. O'Brien v. The People, 216 Ill. 354 (367-8).

The proceedings to punish appellant for contempt in violating the injunction are civil proceedings and it is only necessary therefore to establish his guilt by a preponderance of the evidence. People v. Boconich, 277 Ill. 290 (294-5). We do not think that the finding of the trial court is clearly and manifestly against the preponderance and weight of the testimony. Hake v. People, 230 Ill. 174 (194-5). The trial judge saw the witnesses and heard them

testify. He was in much better position to weigh the evidence than is a reviewing court. We are confined to the written page while the trial judge had the benefit of the demeanor and conduct of the witnesses while testifying and was in a far better position to properly weigh their testimony. Upon this record this court would not be justified in interfering with the judgment of the trial court.

Judgment affirmed.

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Gen. No. 6924. APRIL TERM A. D. 1918. Ag. No. 69.

Chicago-Springfield Coal Co., Appellant.

vs.

Charles J. Le Master, Appellee.

Appeal from Circuit Court of Sangamon County.

Opinion by Waggoner, J.

214 I.A. 652

On March 12, 1917, appellant was operating a coal mine north of Springfield, in Sangamon County, Illinois, and had rejected the Workmen's Compensation Act. Coal was hauled, in the mine, by the use of mules and cars. The Appellee was engaged in driving a mule hitched to a car through an entry known as the Seventh West of the Main South. He entered the mine about 6:30 in the morning and first helped harness the mules and get ready for work. He then took a mule, got two empty cars in which miners were riding and started back into the mine. He was driving down grade, the mule trotting. He saw some slate on the track, the car ran onto the slate, left the track, struck a prop and knocked it down. This loosened a large quantity of slate which fell on appellee, fracturing the third cervical vertebrae.

Appellee brought this action on the case, to recover damages for the injuries sustained. The declaration contains five counts. The

first and second counts charge that the appellant failed to furnish appellee a reasonably safe place to work. The third count charges that the appellant willfully failed to examine the mine and warn appellee of the dangerous condition existing in the mine. The fourth count charges that the appellant failed to properly support the slate in the roof of the mine with props. The fifth count charges that appellant allowed the track to become in a dangerous and unsafe condition. The defendant filed a plea of the general issue.

The jury rendered a verdict in favor of appellee for $12,500.00, and judgment was rendered thereon. Appellant complains that improper evidence was admitted. The hypothetical questions propounded to Drs. Mautz and Deal contained only facts which the

testimony tended to establish. C. & E. I. R. R. Co. v. Wallace, 202 Ill. 129, (133). There is no dispute as to the manner and cause of the injury sustained by reason of the acts of which complaint is made, and in such a case a physician may testify that a later malady was caused by the original injury upon the same principle that he may testify that death resulted from a wound. Such evidence is not speculative. Kimbrough v. Chicago City Ry. Co., 272 Ill. 71, (78).

Appellant claims the damages are excessive. Appellee was thirty-three years old when injured, and was earning from $90.00 to $100.00 a month. His neck was broken, and he has since suffered from traumatic

neurosis. He has always been a coal miner, and the evidence tended to show that he would never be able to work again at his trade. We cannot say the damages are excessive. McCullough v. Ill. Steel Co., 148 Ill. App. 566, (575): Foley v. Everett, 142 Ill. App. 250, (255).

The Appellant insists that the verdict is against the weight of the evidence. We have carefully considered the evidence, and it would serve no useful purpose to set it forth here at length. We cannot agree with appellant. The evidence tends to support the verdict and we cannot say that the conclusion of the jury is clearly against the weight of it. Lyons v. Stroud, 257 Ill. 350, (353).

The Appellant, at the time of making a motion for a new trial, filed an affidavit of one of the jurors to the effect that a member of the jury stated, when considering their verdict, that he had been told that the appellant offered $10,000.00 as a compromise. The conduct of a juror cannot be brought to the attention of the court by affidavits of the jurors themselves or affidavits as to what jurors have said on the subject. Wyckoff v. Chicago City Ry. Co., 234 Ill. 613, (617); Foley v. Everett, 142 Ill. App. 250, (255).

Appellant earnestly argues that the trial court erred in refusing to instruct the jury to disregard the third, fourth and fifth counts of the declaration; that these three counts were faulty, and that it was entitled to an instruction to disregard them by virtue of Sec. 71

Chpt. 110, Hurd's Statute 1917. The appellant did not demur to the counts in question. It does not question the first and second counts of the declaration. Sec. 78, Chpt. 110 Hurd's Statute 1917 provides that where there is an entire verdict on several counts such a verdict shall not be set aside on the ground of any defective count if there are one or more counts in the declaration sufficient to sustain the verdict. "If there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts becomes harmless." Scott v Parlin & Orendorff Co., 245 Ill. 460, (463); Consolidated Coal Co. v. Scheiber, 167 Ill. 539, (541). We do not hold that the last three counts were faulty but even if they were the first two are unquestioned, and the evidence tended to support all the counts so there could be no reversible error in denying appellant's instructions.

Numerous other errors are assigned, all of which have been considered, but we find none that would warrant a reversal. The merits of the case are clearly with the appellee, and the errors urged are highly technical.

Judgment affirmed.

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Gen. No. 6930 OCTOBER TERM A. D. 1918. Ag. No. 6

JAMES H. BARNHART, Plaintiff in error,

vs.

H. F. CHESTER, et als., Defendant in error

Appeal from the Circuit Court of Champaign County

Opinion by Waggoner, J.

214 I.A. 652

The plaintiff in error brought an aciton on the case against the Chester Transfer Co., a partnership, to recover damages resulting from having been struck, knocked down and ran over by an automobile. H. F. Chester, who entered his appearance, was the only defendant below or here. To a declaration of seven counts the general issue was filed, and the jury returned a verdict for the defendant.

On November 6, 1915, at about 11:30 p. m., James H. Barnhart was crossing University Avenue in Champaign. Plaintiff in error walked out into University Avenue, saw a street car going east, and waited for it to pass. He says an automobile was following the street car, and when such automobile had passed he started on and was struck by defendant's automobile going west.

It is claimed that it was error to exclude the evidence of the witness Henry Jones, by whom it was sought to be shown that the next

morning, about nine or ten o'clock, there was a track in the dirt, where the collision occured, about ten inches wide and forty-five feet long. The evidence shows that University Avenue is one of the main streets between the cities of Champaign and Urbana, and that automobiles and street cars are passing back and forth, on that street, practically all the time. There was no showing, or offer to show, that the conditions the next morning at nine or ten o'clock were the same as at the time of the accident. Conditions subsequent to the accident may be shown only where the conditions have not changed. Unless the evidence relates to a time so close to the accident that it is apparent the condition has not changed, there must be proof that the conditions are the same. Under the facts appearing there was no error in excluding the evidence.

Plaintiff's first refused instruction overstates the

rule that the testimony of one witness may be of more weight than that of many, by using the expresion "much more weight" when " more weight" is usual and proper phrase. Plaintiff's second refused instruction erroneously attempted to state it to be the duty of the defendant to give warning by horn or bell on approaching a street crossing. There is no such duty as a matter of law, but it is for the jury to say under all the facts and circumstances of a given case what does or does not constitute negligence. Winn v. C. C. C. & St. L. Ry. Co., 239 Ill. 132, (139).

Plaintiff's third refused instruction erroneously assumes that

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the collision occurred at a street crossing. It also erroneously requires the defendant to have his car under such control that he can prevent its running over anyone. This would require defendant to use more than due care, and would make him liable even where he was guilty of no negligence. The seventh refused instruction also required defendant to keep his machine under such control as will enable him to avoid a collision with another person who may be using due care. The defendant is only liable in case of negligence. There was no error in refusing instruction five, as the matter of due care was sufficiently covered by instruction eight that was given.

We have carefully considered the numerous errors urged in the several instructions given for defendant, but it would serve no useful purpose to discuss them in detail. There is no reversible error in the instructions.

It was error to admit in evidence the ordinance of Champaign, prohibiting bright lights on automobiles, but such errors was harmless. The ordinance was wholly immaterial and should have been excluded, but as it had no bearing on the issues it could not have injured the plaintiff.

On a motion for a new trial affidavits were presented of newly discovered evidence. The affidavits were not preserved in the bill of exceptions, and for that reason cannot be considered. People v.

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Weston, 236 Ill. 104 (105); Green v. Jennings, 184 Ill. App. 340 (343).

The abstract shows no judgment rendered, and this alone would be a sufficient reason for affirming the case. Flaningham v. Hogue 59 Ill. App. 315, (318).

Judgment Affirmed.

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Gen. No. 6939 OCTOBER TERM A. D. 1918. Ag. No. 12

The Aultman and Taylor Machine Co.,
Defendant in Error.

vs.

Elmer E. Haulman and J. H. Haulman.
Plaintiffs in Error.

Error to Circuit Court of Macon County.

Opinion by Waggoner, J.

214 I.A. 652 3

On December 28, 1915, defendant in error procured a judgment, by confession, in the circuit court of Macon County for $2425.42 against the plaintiffs in error, on ten notes five of which were given on April 21, 1915, and the remainder on June 26, 1915. Afterwards the judgment was opened, leave given plaintiff in error to plead and a number of pleas were filed. On the trial of the case a jury returned a verdict, in favor of the defendant in error, for $1340.00 and judgment was entered thereon.

On June 20, 1911, plaintiff in error, Elmer E. Haulman, purchased from defendant in error, at Decatur, Illinois, a sixteen horse power Avery engine, a separator and a tank for which he gave his notes aggregating $1466.00. On September 21, 1912, he traded this engine for a second hand Avery twenty horse power engine and gave his notes for an additional $400.00 together with a chatel mortgage securing their payment. Afterwards he bought a clover huller for $750.00 for which he gave his note secured by a chattel mortgage. The various notes were renewed, from time to time, and in April and June 1915, the notes upon which judgment was entered, were given in renewal of the former notes and were signed by plaintiff in error, J. H. Haulman, as

security.

It was the contention of the plaintiffs in error that the contract between the parties was verbal; that the second Avery engine had been verbally warranted to them and that such engine had not proven to be as warranted. The defendant in error claimed the contract for such engine was in writing and that no verbal testimony was admissible. The execution of the con-

tract, referred to by defendants in error, was denied by a verified plea and plaintiffs in error insisted that although it should be determined that it was their contract, yet that there were parts of the contract made by them with defendants in error, that were by words of mouth and for that reason the whole of it would be treated as a verbal contract.

On the trial, in the circuit court, the defendant in error (plaintiff) offered in evidence the ten notes above mentioned, together with the judgment that had been rendered thereon, by confession, and rested its case.

The defendant, Elmer E. Haulman, was sworn as a witness in his own behalf. His examination had proceeded but a short time when Mr. Fitzgerald, one of the attorneys for the defendant in error, interrupted the examination by asking "leave to ask a question of privilege" to which the court replied "Go ahead. * * * I suppose he (Fitzgerald) asked for the privilege of asking him to show the written contract." Mr. Fitzgerald replied that he did and presented to the witness an order for the second Avery engine. In answer to a

question, asked by Mr. Fitzgerald, as to the signature to such order, the witness said it was his. On objection being made by plaintiffs in error that the proper time, for defendant in error, to make such proof would be in rebuttal the court announced that such evidence was proper at that time for the purpose of finding out whether or not the agreement was reduced to writing.

The court, at this point of the trial, adopted the view of the defendant in error that the contract was in writing and thereafter refused to permit plaintiffs in error to make any proof in support of their contention in that regard. Plaintiffs in error certainly had a right to offer evidence in support of their pleas upon which issue had been joined and to have the jury determine who was right as to the facts. While the witness had been asked about the signature such contract was not yet in evidence and should not have been, for any purpose, considered by the court.

The contract was offered, by defendant in error, in rebuttal and then admitted in evidence. The mere fact that the witness Haulman said that it was his

signature to the contract would not necessarily make it admissible and it certainly would not have been admissible on cross examination. The action of the court in deciding that the contract was in writing as was done and then excluding evidence, offered by plaintiffs in error was erroneous.

Complaint is made that the court erred in giving the fifth instruction wherein the jury were told that the "prima facie case (made by plaintiff) under the pleadings and evidence in this case,

has in no way or manner been overcome by an alleged breach of warranty or failure of consideration." As a statement of law the instruction is probably correct after the exclusion of the evidence offered by plaintiff in error in support of their pleas of warranty and failure of consideration. With the evidence admitted, in support of such pleas, the instruction would have been an invasion of the province of the jury whose right it would have been to determne that fact.

In the sixth instruction the jury were told that if they believed from the evidence, that the parties entered into the written agreement introduced in evidence they are bound by the terms thereof.

Under this instruction if the plaintiff in error, Elmer E. Haulman signed the written agreement he would be bound by its terms no matter how his signature was obtained by fraud or otherwise. This instruction is erroneous.

The seventh instruction is also erroneous in that it submits to the jury the question as to whether or not the defendant in error was entitled to recover upon the notes and judgment without stating under what conditions of law such recovery could be had.

The judgment of the circuit court is reversed and this cause remanded.

Reversed and Remanded.

583

Gen. No. 6948 OCTOBER TERM, A. D. 1918 Ag. No. 18

MONT R. FISHER, Appellant.

vs.

EUGENE BROWN, et als., Appellees.

Appeal from Circuit Court of Tazewell County.

Opinion by Waggoner, J.

214 I.A. 652 4

This is a suit brought by appellant to recover damages to three lots, owned by him, in Urbandale Addition to the Village of East Peoria. The declaration alleges that appellant bought two of the lots from appellee June 21, 1912, and the other one on June 1, 1913; that in the year 1910 appellees platted and laid off this addition and in doing so plowed, scraped and filled up a creek or water course running westerly through what is called Shadoway Street, the lots bought by appellant being near and adjacent to such street; that appellant went into possession of the lots June 1, 1913; that at the time he purchased the lots and went into possession of them he did not know and had no reasonable means of knowing that appellants had filled up the creek and natural water course until the summer of 1915 when the creek, because of its having been leveled off, filled up with earth, sand and other obstructions, overflowed and thereby washed sand, gravel, earth and other substance upon and over the lots on

five different times during the summer of the year 1915 and six times during the summer of the year 1917 (giving the dates) and that the appellant is injured and has sustained damages.

To the declaration a general and special demurrer was interposed, sustained and judgment rendered against appellant for cost, from which judgment he appealed to this court.

The declaration shows that appellant, a year and a half after the plowing, scraping and filling complained of has been done, bought the lots of appellees who were the owners of the whole of the addition when they did the work. This case is one of complaint by the present owner of lots for acts done by a former owner resulting in injury to the present owner. Appellant's

theory seems to be that the declaration charges the defendants with actionable negligence. The authorities cited by appellant are all to the effect that a purchaser takes the estate subject only to easements created expressly or by implication from the terms of former grants, or such others as are apparent from inspection of the premises. No other reasons are advanced by appellant in support of the declaration. The appellant assumes that there is an easement of flowage across his lots. The allegations tend to show a natural right of flowage. It is not apparent wherein the defendants owed the plaintiff any duty that they have negligently

violated. The declaration falls far short of charging the defendants with deceit. The action of the court in sustaining the demurrer was right, and the judgment is sustained.

Affirmed.

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violated. The declaration falls far short of charging the defendants with deceit. The action of the court in sustaining the demurrer was right, and the judgment is sustained.

Affirmed.

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Gen. No. 6951. OCTOBER TERM A. D. 1918. Ag. No. 21

WILLIAM UNWILLER, Appellee,

vs.

LEWIS JURGENSMYER, Appellant.

Appeal from the Circuit Court of Vermilion County

Opinion by Waggoner, J.

214 I.A. 652

The appellant on October 16, 1916, borrowed a male hog from appellee in good healthy condition, took it from the farm of appellee to his own, and kept it until November 30, and then returned it. Appellee claims that while the hog was on appellant's farm it became infected with a contageous disease; that appellant knew it; that it thereby became his duty to use all reasonable means to prevent the spread of such disease; that instead of so doing he returned the hog to the farm of appellee where he (appellee) had about seventy hogs in good healthy condition; that by reason of appellant's wrongful act such disease communicated to appellee's hogs, and that most of them became infected with such contageous disease and died.

Appellant says the hog was in good healthy condition at the time he was borrowed, and likewise when he was returned; that during the time the hog was on his farm there were no diseased hogs upon it and none until long after the hog in question was taken away.

The jury returned a verdict in favor of appellee for $400.00, judgment was rendered thereon, an appeal taken, and appellant insists that the verdict is not supported by the evidence.

It was encumbent upon the appellee to show, by a preponderance of the evidence, that his hog became infected with a contageous disease while in the possession of appellant, and that such disease was communicated from the hog to other hogs of appellee after being returned to his farm. This has not been done. The parties to this suit were friends. The hog was loaned, without compensation, to be returned by December 1, as appellee wanted to use the hog at that time. The hog was returned November 30. Appellee testified that he got home about three o'clock in the afternoon, and found the male hog in with his other

hogs, sick, coughing, and would not eat; that appellant had told him at Fred Sickel's sale, the day before, that the hog was sick; that he (appellant) thought the hog was going to die, and that he (appellant) would have the hog to pay for. The record shows no reply, made by appellee, to this statement, notwithstanding the hog was to be returned for appellee's use two days later. No objection, on his part, to a sick hog being brought on his farm where he had seventy others. William Richards says two months later appellee asked him if he recollected the conversation. Richards

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recollected it, and says Jurgensmyer came up where four of us (Unwiller, J. H. Jenks, Thomas Richards and myself) were standing, and said, "Unwiller, that hog acts sick. I expect I will have you to pay for him." J. H. Jenks was called and testified that he saw Jurgensmyer and Unwiller talking, but was not close enough to hear what was said. Thomas Richards was not called, nor his absence explained. Appellant denies having made these statements, and in view of the evidence in this case, we believe him. Appellee says when he got home and found the sick hog with his other hogs that he, on that evening, had Reuben Abbott and Everett Turner take the sick hog away from the rest of the bunch and put him in a pen west of the house in the orchard. Everett Turner was not called, and no showing of what effort, if any, was made to produce him. If appellant's contention is true, he was a material witness. Reuben Abbott testified that he saw the hog the next morning, and did not have anything to do with putting him in any other place, and further that the hog was first put in the pasture and then changed to the orchard. It is not disputed that the hog was gotten from a box stall in a barn. Appellant and Leslie Towner both testified that the hog, when returned, was put in the box stall. The parties to this suit live three and one-half miles apart. Appellant does not live on his farm but in Homer. According to Appellee's statement he

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said nothing to appellant about the condition of the hogs until the male hog died about a month after it had been brought back. Appellant testified that on the next

morning, after returning the hog, he went to Canada, bought one hundred and eight hogs, brought them home December 9, 1916, put them in with his other hogs, and that he bought still other hogs at the State Fair, which were taken to his farm. If appellant had cholera on his farm, he did an unusual thing in buying other hogs and putting them on the farm.

Appellant is corroborated in his statement that the male hog was sick when brought home, by Reuben Abbott, who saw it the next morning, and by no one else. Appellant is corroborated in his statement that the hog was not sick when returned, by Leslie Towner, who went with him to take it back, by Harvey Boyd, the tenant on appellant's farm where the borrowed hog was kept, and by appellee's silence for a month thereafter.

Appellant testified there were no sick hogs on his farm while appellee's hog was there, and is corroborated by the tenant, Harvey Boyd, and by Earl Towner, an employee working on the farm.

Appellee testified that his other hogs begun getting sick about a month after the male hog was brought back, and that it might have been five weeks. He is corroborated by Reuben Abbott and no

one else. J. H. Jenks, a witness called by appellee, testifies that he was at appellee's in November; that he saw his hogs, and did not see any sick ones, but on cross examination said he did not know whether there were any sick hogs or not, and to the same effect is the testimony of Lon Libka. Appellee is contradicted by Edgar Martin, who testified that in a talk had with him in November (which would be while the male hog was at appellant's) appellee said his hogs were dying; that he was loosing three or four a day. Charles Steinberger testified that in the latter part of November he saw three dead hogs on appellant's farm, and that appellee said he was burning some of them. John Anderson saw 4 small hogs dead on appellee's farm in November. On October 24, 1916, Ulysses Easton began working for appellee on his farm and worked three weeks. He testified that "the whole bunch" of the hogs was sick when he went there, were not eating, and that at appellee's direction (which is not denied) he hauled out six or eight dead hogs and scatteered them

in the fields, and that a dozen or dozen and a half died in the fall of 1916 while he was there. J. T. Hall, a veterinary surgeon called by appellant, testified that where a hog is exposed to cholera in an acute form the period of incubation would be from three to seven days, and in a chronic form seven to ten days. O. P. Dickson, a veteranary called by appellee,

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testified that a virulent infection would develop in a very few days; any other might be ten days, not over fourteen days, and that the general run of time would be from five to ten days. As has been stated, appellee said his hogs began getting sick about a month after the male hog was brought back, and that it might have been five weeks.

The verdict of the jury evidently was a compromise. An effort to divide a loss between the parties. If appellee was entitled to recover, his claim was $764.00 and not $400.00 A verdict for the last named sum finds no basis whatever in the evidence.

In the case of Schwill & Co. v. Moulton, 168 Ill. App. 519 (523) the court says, "Counsel for plaintiff urges a reversal of the judgment on the ground that the verdict of the jury, for the sum of $300.00 in favor of plaintiff, is inconsistent with any legitimate theory of the evidence and cannot be accounted for except as the result of compromise or bias. We are of the opinion that for this reason the judgment of the court should be reversed and the cause remanded. Conrad Seipp Brewing Co. v. Peck, 85 Ill. App. 637; Dewes Brewing Co. v. Kerkin, 107 Ill. App. 620-621; Manhattan Brewing Co. v. Riordan, 157 Ill. App. 234; Dunlay v. Smith, 25 Ill. App. 288-291; Chicago & Alton R. R. Co. v. Gretzner, 46 Ill. 74-81; Larson v. Glos, 235 Ill. 584-587." It is somewhat significent that appellee is willing to accept a

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judgment of $400.00 on a claim of a much larger amount.

The court erred in overruling appellant's motion for a new trial. The judgment will be reversed and the cause remanded.

Reversed and Remanded.

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Gen. No. 6956. OCTOBER TERM A. D. 1918 Ag. No. 57

Letha Ferguson, Administratrix of the estate of Robert Ferguson, deceased, Appellee.

vs.

214 I.A. 653

Chester Yarnell and Flossie M. Yarnell, Appellants.

Appeal from Circuit Court of Moultrie County.

Opinion by Waggoner, J.

The appellee, Letha Ferguson, as administratrix of the estate of Robert Ferguson, deceased, brought an action on the case against the appellants, Chester Yarnell and Flossie M. Yarnell, his wife, to recover damages for the death of appellee's intestate, caused by a collision between an ice wagon and an automobile. The case was tried before a jury that returned a verdict, against the appellants, for $2350.00.

The appellants claim, (1) that appellee's intestate was guilty of contributory negligence in violating a city ordinance by stopping his wagon, in a street, more than two feet out from the curb, and by not tieing his horse; (2) that (a) there is no proof as to how the collision occurred; no proof that the automobile ran into the ice wagon, and appellants therefore invoke the well settled rule that

proof of the collision alone is no proof of negligence; and (b) that there is no proof that appellant, Flossie M. Yarnell, was the agent of her husband and driving the automobile for him about his business; (3) that the court erred in giving and in refusing instructions; (4) that there was error in the admission of evidence, and (5) that the damages are excessive.

The appellee's intestate, Robert Ferguson, was in the e mploy of C. O. Pifer, and on the morning of May 17, 1917, was delivering ice with a one horse wagon. On going east, on West Harrison Street in the City of Sullivan, Robert Ferguson stopped his horse and wagon in front of the residence of O. J. Gauger on the south side of the street. The street was paved. The pavment was thirty-six feet wide. The ice wagon stopped so that the south rear wheel was four or five feet from the curb. Robert Ferguson was standing on a step at-

tached to the rear end of the wagon and was sawing ice. At about eight o'clock in the morning of May 17, 1917, the appellant, Flossie M. Yarnell, was driving east on West Harrison Street, in a five passenger Paige touring car, with her child. The automobile belonged to the appellant, Chester Yarnell, her husband. Chester Yarnell told the witness Nettie E. Sears, that "the reason he sent her (his wife) was because he was too busy to take the time himself", and that the

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collision happened because his wife's "foot was numb." He had a plow share at a blacksmith shop in Sullivan being sharpened. Flossie M. Yarnell was driving at about twelve to fifteen miles an hour. The automobile ran into the ice wagon from the rear, binding Robert Ferguson between the radiator of the car and the rear end of the ice wagon, inflicting injuries from which he died in about two hours. Three carpenters were at work building a poarch on the Gauger house. One of the carpenters, Andrew Weakley, testified that he was working on a scaffold at the northwest corner of the house, and his attention was attracted by the noise of an automobile coming from the west; that it was Mrs. Yarnell; that he saw her when she was from sixty to one hundred feet from the ice wagon and she was looking up at the men on the porch. He turned his attention back to his work; heard a crash; looked around and saw the automobile had run into the wagon, and had caught Robert Ferguson between the two. He had seen Robert Ferguson working behind the ice wagon sawing ice and standing facing the east just a short time before. The wagon was still going when he looked around. The automobile pushed the wagon from twenty to twenty-five feet. The horse was lunging and the harness broken. The witness ran to the scene of the accident. He found the automobile and wagon fastened together by the left front spring of the automobile being

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fast in the left rear wheel of the wagon with Robert Ferguson pinioned between the two. Five or six blocks of ice were scattered over the pavement.

Jessie Buxton testified that she lived across the

street northeast from where the accident occurred. She was looking out the window; saw Flossie Yarnell in the automobile approaching and saw the automobile and wagon come together. Flossie Yarnell was crying. The witness said, "I really think she thought she was over farther than she was." As near as the witness could remember she (the witness) shut her eyes just before they came together.

The appellants took the deposition of Harry M. Rhoda and Verdi P. Rhoda. On the trial appellee asked for the depositions, and appellants' attorney stated, in the presence of the jury, that they would produce them in good time. The depositions were then in the office of appellants' attorney. The appellants' attorney the next day returned the depositions and stated before appellee rested that the depositions were in the court files. Appellee rested without offering the depositions in evidence, and appellants did not offer them. Afterwards the court, very properly, permitted the appellee to reopen her case and to offer the depositions. Harry M. Rhoda testified that he was a Captain in the Salvation Army: that he was in

Sullivan on May 17, 1917, and saw the collision between the automobile and ice wagon. He testified, "I was looking directly at the parties and the objects when the accident happened. The ice wagon was standing on the right side of the street, stationary."

There were a number of witnesses on the scene immediately after the collision. The brakes were not set on the automobile. They pushed the automobile back and took Robert Ferguson from between it and the wagon, and carried him to his home, where he afterwards died. Robert Ferguson had worked for C. O. Pifer for eighteen years. He was sixty-four years of age; was earning seven dollars a week and his house rent of nine dollars a month. He had a wife and two daughters, one ten and the other seven years of age.

Appellants earnestly argue that there is no proof as to how the collision occurred, and that proof of a collision is no proof of negligence. It is true, as a matter of law, that proof of a collision alone is no proof of negligence. But it is not correct, as a matter of fact, that

there is no proof in the record of how the collision in question occurred. The evidence shows that the collision occurred by Flossie Yarnell's running the automobile she was driving into the rear end of the ice wagon on which Robert Ferguson was standing. The wagon was standing still when the automobile struck it. It

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was in broad daylight; the view unobstructed, and there is no apparent excuse for striking the wagon. The evidence shows that she was looking up at the carpenters on the house when she was sixty to one hundred feet from the wagon. According to the evidence it was her negligence, in not looking ahead, that caused the collision. It is not a case of guessing that the horse may have backed the wagon into the car as is argued. We need only refer appellants to the deposition they caused to be taken, in which an eye witness states that the wagon was stationary at the time. The evidence shows that Chester Yarnell admitted having sent his wife to town because he was too busy to take the time to go himself. He did not deny it, and the natural inference is that it is true. (Moore on Facts, Par. 575). There was evidence fairly tending to prove negligence and to establish that Flossie Yarnell had been sent to town by her husband. This being so, the question was one for the jury. Chicago City Ry. Co. v. Gemmill, 209 Ill. 638, (641). The question of contributory negligence was likewise one for the jury. Considered in the most favorable light the violation of the ordinance of the City of Sullivan merely constituted evidence of contributory negligence, but did not establish it as a proposition of law. Coulter v. I. C. R. R. Co., 264 Ill. 414, (419) (422); Star Brewery Co. v. Hanck, 222 Ill. 348 (352).

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Appellants insist that it was error to allow the witness Andrew Weakley to testify in reference to the tracks of the automobile and wagon in the sand of the pavement. He saw the wagon and automobile just before and immediately after the collision. He measured the tracks in the afternoon of the same day, and swears positively that they were the tracks made at the time of the collision. To admit this evidence was proper. It was also proper to allow the witness to state that Flossie Yarnell was looking up at the carpen-

ters when only sixty to one hundred feet from the place where the collision ocurred.

It would extend this opinion to an unreasonable length, and serve no good purpose, to discuss the instructions in detail. It is sufficient to say that we find, after carefully considering all of them, that there was no error either in giving or refusing instructions in this case.

The damages are not excessive. The judgment will be affirmed.

Judgment Affirmed.

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Gen. No. 6961 OCTOBER TERM 1918. Ag. No. 27.

HENRY WHITED, Appellant.

vs.

A. J. DAFT, Appellee.

214 I.A. 653

Appeal from the County Court of Fulton County.

Opinion by Waggoner, J.

The evidence in this case shows that appellee was in an automobile going west on Fort Street, towards West Street, in the City of Farmington, Illinois; that he was traveling at about five miles an hour, and was on the north (right) side of the street. At the same time appellant was on a motorcycle going south on West Street, towards Fort Street, traveling about fifteen miles an hour, and was on the east (left) side of the street. There is a building ten or twelve feet from the northwest corner of the intersection of these streets that would obstruct somewhat the views of these parties of each other when near such intersection.

Appellant says he intended to turn and go east on Fort Street. Appellee says it was his purpose to continue going west. As appellant approached the intersection of these streets, he gave no signal, was running fifteen miles an hour, and on the wrong side of the street. Appellee was traveling five miles an hour, on the right side of the

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street, sounded his horn as he came towards the intersection of the streets, and when he saw appellee, shut off the gasoline in his automobile, applied the brakes (both foot and emergency,) hollowed to appellant, who reduced his speed and turning went in a southeasterly direction. About the center of the streets appellant stopped, jumped from his motorcycle, and appellee's car ran upon and damaged it.

The damage done to appellant's motorcycle resulted from his own negligence as above indicated, and the County Court did not err in refusing to set aside the verdict of the jury and grant a new trial.

Affirmed.

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587

Gen. No. 6969. OCTOBER TERM A. D. 1918. Ag. No. 32

R. E. BOWERS, Appellant.

vs.

JOHN MAXEDON, MABEL MAXEDON, H. C. KEARNEY, C. G. FOSTER, ELIZABETH A. FOSTER and N. W. Boggs.

Appellees.

214 I.A. 653

Appeal from Circuit Court of Moultrie County.

Opinion by Waggoner, J.

The appellant, R. E. Bowers, in the year 1913 was the owner of a meat market in the Village of Lovington, consisting of a stock of meat, tools and fixtures. On July 14, 1913, appellant sold the meat market to the defendant, John Maxedon and Mabel Maxedon for $1100.00, and took in payment their promissory note due in one year. In August 1913, the Maxedons sold the meats and merchandise to Deshe Barbetti, and leased him the tools and fixtures. Barbetti conducted the meat market for about three months; sold all the meat, and then surrendered his lease to the Maxedons. The shop was then closed for four weeks. At the expiration of that time the Maxedons sold most of the tools and fixtures to C. G. Foster, Elizabeth A. Foster and Harry C. Foster, and the remainder of such tools and fixtures to N. W. Boggs.

The appellant brought suit against the Maxedons, when their

note became due, and recovered a judgment for $1193.45. An execution was issued and returned no property found. Appellant instituted this suit, by filing a bill in chancery, claiming the sales by the Maxedons to Barbetti and the appellees were in violation of the Bulk Sales Law, and therefore void. The case was referred to a Master in Chancery, who took and reported the evidence, and recommended a decree in favor of appellant and against appellees. Exceptions filed by appellees to the report of the Master in Chancery were sustained by the Circuit Court, and appellant's bill dismissed for want of equity.

The Bulk Sales Law provides that the sale in bulk of the major part or the whole of the stock of merchan-

dise, or merchandise and fixtures, or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business, shall be farudulent and void as against creditors. The tools and fixtures sold to the Fosters, Kearney and Boggs were not the major part of the stock. Further the business had been closed for four weeks, and it was not a purchase of goods used in the vendor's business. Larson v. Judd 200 Ill. App. 420.

The Circuit Court did not err in dismissing the bill for want of equity, and the decree will be affirmed.

Decree affirmed.

Judgment affirmed.

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Gen. No. 6973. OCTOBER TERM A. D. 1918 Ag. No. 36

The Town of Griggsville, Appellee.

vs.

George R. Newman, Appellant.

Appeal from Pike.

214 I.A. 653

Opinion by Waggoner, J.

This suit was brought by appellee, against appellant, to recover a penalty provided in Section 151, Chapter 121, Hurd's Statute 1917, for encroaching upon a public highway with a fence. Judgment was recovered in the circuit court by appellee for $82.00 and costs, from which appellant appealed.

The court, on behalf of appellee, gave to the jury the following instructions:

"The court instructs the jury that if you find from a preponderance of the evidence that the road at the place in question is a public road; that the defendant obstructed it by encroaching upon the same with a fence and that the commissioner of highways ordered the defendant to remove said obstruction, then if you find from a preponderance of the evidence, the facts as above set forth, you should find the issues for the plaintiff and assess its damages at the sum not less than three dollars and not more than ten dollars for obstructing said public road and not exceeding three dollars per day for every day defendant suffered such obstruction to remain after he was ordered to remove the same by the commissioner of highways until the commencement of this suit."

"The court instructs the jury that if you find from a preponderance of the evidence that the highway at the place in question is a public highway; that the defendant obstructed it by encroaching upon the same with a fence built longitudinal therewith and within the highway and that the commissioner of highways of the Town of Griggsville ordered the defendant to remove said fence, then if you find the facts as above set forth, from a preponderance of the evidence, you should find the issues for the plaintiff and assess its damages at a sum not less than $3.00 and not more than $10.00 for obstructing said

public highway and an additional sum not exceeding $3.00 per day for every day defendant suffered such fence to remain after he was ordered to remove the same by the commissioner of highways, up to the time this case was commenced."

The court also gave, on request of appellee, four other instructions in each of which was stated some material fact necessary for appellee to prove in order to recover, and the jury were only required to find such fact by a peponderance, or greater weight, of the evidence.

These instructions were erroneous in not requiring the charge to be proved by a clear preponderance of the evidence.

In suits brought to recover a penalty for the violation of an ordinance, or a statute, a preponderance of the evidence is not sufficient to authorize a recovery but the charge must be proved by a clear preponderance of the evidence. Toledo, Peoria & Warsaw Ry. Co. v. Foster, 43 Ill. 480; Atchison, Topeka & Santa Fe Ry. Co., 227 Ill. 270; Ruth v. City of Abingdon, 80 Ill. 418; City of Waverly v. Goss, 138 Ill. App. 68; Chicago & Eastern Illinois R. R. Co. v. People, 44 Ill. App. 632.

In the opinion of the majority of this court the verdict is against the weight of the evidence.

Judgment Reversed and Cause Remanded.

589a

Gen. No. 6977. OCTOBER TERM A. D. 1918. Ag. No. 39

JOHN E. MURRAY, Appellee.

vs.

214 I.A. 653

VANDALIA RAILROAD CO. Appellant.

Appeal from Circuit Court of Macon County.

Opinion by Waggoner, J.

The appellee, John E. Murray, brought suit in the Circuit Court of Macon County, against the Vandalia Railroad Company to recover damages to certain real estate owned by him in the City of Decatur, alleged to have been caused by the construction of a freight house and terminals, by the appellant, adjoining said real estate. A trial before a jury resulted in a verdict, for appellee, for $487.25, on which judgment was rendered. On appeal to this court the case was reversed and remanded. (Murray v. Vandalia R. R. Co., 202 Ill. App. 362.)

The case was re-docketed in the Circuit Court. On the second trial the jury returned a verdict, for appellee, for $1000.00 damages, on which judgment was rendered, and this appeal taken.

In the declaration no claims are made for damages on account of noise arising from loading or unloading freight; noise from cars bumping together, or going over the Morgan Street crossing; noise from atmospheric

vibration caused by water boiling in the engines, noise from dragging about iron plates used in bridging the space between cars and the loading platform, or damage due to the increased danger of accident at the Morgan Street crosing. Nevertheless witnesses testified to these things and enumerated them as elements considered in determining the depreciation in value of the property, which depreciation they testified to in a lump sum.

It is of course elementary that the evidence must be in support of the allegations in the declaration, and confined to the point in issue. It was not proper to allow witnesses to base their statements showing depreciation in value on elements of which no complaint is made in the declaration. This was clearly stated in

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the former opinion, but little attention seems to have been paid to it on the second trial.

The seventh and ninth instructions, which told the jury that appellee was entitled to a verdict if he proved his case as alleged in the declaration, are subject to criticism, (City of Chicago v. Sutton, 136 Ill. App. 221, (229), yet such instructions are not necessarily reversible error. (Waschow v. Kelly Coal Co., 245 Ill. 516, (521). Such a method is not the best and does not conduce to a clear understanding on the part of the jury of the question submitted to them. Dickson v. Swift Co., 238 Ill. 62, (68).

Judgment Reversed and Cause Remanded.

590a

Gen. No. 6984. OCTOBER TERM, A. D. 1918. Ag. No. 45

I. N. RANSOM, Appellee

vs.

214 I.A. 654

GEORGE B. GILLESPIE et al Appellants

Appeal from the Circuit Court of Sangamon County.

Opinion by Waggoner, J.

This is an action of assumpsit brought by appellee against appellants. The declaration was the common counts, and the plea filed was general issue. A bill of particulars was also filed, reciting that appellants in consideration of $575.00 on November 3, 1916, assigned to appellee an order for the payment of $500.00 in the guardianship of Mabel and John McDale, when no such order existed. Trial was held by the court, and judgment rendered in favor of appellee for $570.72 and cost.

Appellee claims that on November 6, 1916, he bought from appellants some notes and an order for the payment of $500.00 in the guardianship of Mabel and John McDale, for all of which he paid $1828.22, and that $570.72 of that amount was for the order; that no order, of the character above mentioned, existed and that he had received nothing for the money paid therefor.

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Appellants contend that in addition to the notes sold appellee, about which there is no question, they had a claim (not an order) against the guardianship of said minors, which they sold him.

A check, given by appellee to appellant at the time of the transaction between them, is dated November 6, 1916. From two to four weeks afterwards George Gillespie, one of the appellants, at the request of appellee, signed a certain instrument of assignment, which reads as follows:

"Springfield, Illinois,
Nov. 3, 1916

For and in consideration of the sum of One ($1.00) Dollar and other good and valuable consideration in hand paid the receipt whereof is hereby acknowledged, George B. Gillespie and A. M. Fitzgerald, formerly doing business under the firm name of Gillespie & Fitzgerald, without recourse, hereby assign to I. N. Ransom an order for the payment of $500.00 in the guardianship of Mabel and John McDole under petition filed June 26, 1914, and recorded in Guardians Report Record 15, page 436.

Geo. B. Gillespie.
A. M. Fitzgerald
Gillespie & Fitzgerald."

There was no order of the Probate Court authorizing the payment of $500.00 to Gillespie and Fitzgerald in the guardianship of Mabel and John McDole, under any petition filed June 26, 1914. Guardian's Report Record 15, page 436, was the record of a report of said

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Fitzgerald as guardian for said minors showing the receipt and disbursment of $750.00; that he had filed a petition accompanying said report in which he resigned his guardianship, setting up that the firm of Gillespie and Fitzgerald had represented said minors, in a will contest, together with their adult brothers and sisters; that the case was taken on a contingent fee; that a settlement had been procured which was approved by the Probate Court; that there was owing to said firm $500.00, from said minors, for their services; that there was no money with which to pay the claim, and asking that the succeeding guardian be authorized and directed to sell some property to pay the same.

The foregoing is the claim appellants say they sold appellee; that he bought and paid for it after being told all about it, and informed that he should have his counsel examine the status of the claim before buying.

The court held the three following propositions of fact submitted by appellants.

6. The Court finds, as a matter of fact, that the plaintiff was fully and truthfully advised by the defendants of the nature and amount of all their claims against the McDole heirs at the time the plaintiff purchased said claims and paid the consideration therefor by delivering his check, including the claim against the minor heirs

Page 3

pending in the Probate Court, and that the defendants were guilty of no fraud or deception in obtaining said contract from the plaintiff and in obtaining the payment of said consideration.

7. The Court further finds as a matter of fact, that the instrument dated November 3, 1916, and reading as follows: (setting out the foregoing assignment) was prepared by the plaintiff, or by someone for him, some days after he had purchased of the defendants all their claims against the McDole heirs, or the McDole estate, and had paid the consideration therefor; that said instrument was taken to the office of the defendant, Gillespie, for this signature; that the defendant Gillespie informed the plaintiff that he did not know what was on file in the Probate Court nor what record was made there and declined to sign his name or the firm name to said instrument; that said Gillespie, on the suggestion of a clerk in his office, Mr. Francis, interlined said instrument as originally prepared, the words "without recourse" and signed the same, and that the plaintiff paid to the defendants no additional

consideration for the execution of said instrument and was not mislead or defrauded by the recitals thereof.

8. The Court finds that although the instrument of date November 3, 1916, purported to assign to I. N. Ransom an order for the payment of $500.00, in guardianship of Mabel and John McDole, under a petition led June 26, 1914, recorded in Guardian's Report Record 15, page 436, and that no order had at that time been made for the payment of said sum of $500.00, nor was there and order on the record under the date, or at the page referred to, still the Court finds from the evidence that before said instrument was prepared, the plaintiff was informed by the defendants that they only had a claim against Mabel and John McDole for $500.00, and the plaintiff knew said recitals were not true, that said recitals were prepared either by the plaintiff or some one else, and not by the defendants, except the words "without recourse", which were interlined by the defendant

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Gillespie at the time said instrument was presented by the plaintiff for signature, and the plaintiff was not mislead by any false statement, or false reference, in said instrument, but under the evidence herein, said instrument was the representation and instrument of the plaintiff, and not the representation and instrument of the defendants.

No cross errors have been assigned and the finding of fact must therefore, as against appellee, be considered to be supported by the evidence. Ross v. New South Farm and Home Co., 191 Ill. App. 353.

Appellants had notes secured by mortgages, aggregating $1100.00 that had been given by the adult McDole heirs. Proceedings were pending for the partiton and sale of the land owned by such heirs. Appelee wanted to buy the land and testified he went to see appellants "to purchase some notes and order for minor heirs", and so must have had some knowledge of the matter existing between appellants and such minor heirs at that time. Appellee sought appellants to buy from them. They were not trying to sell to him and, after several attempts to buy, a sale was consumated. Appellants guaranteed nothing. Appellee knew what he was buying and cannot now complain.

The assignment was not delivered as a part of the sale, but was prepared by the appellee, or some one for him, and not by the appellants, and the court below has found as a fact, (to which finding no cross error has been assigned) that he (appellee) knew the recitals therein were not true; that said instrument was the representation and

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instrument of the appellee and not of appellants. Under the finding of facts, in this case, it was error to render judgment against appellants. The judgment is reversed.

Reversed.

We find, as an ultimate fact, that appellants are not indebted to appellee on account of the claim sued on.

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1591

GEN. No. 6988 OCTOBER TERM A. D. 1918. Ag. No. 48

LOUIS JAGGERS, Appellee

vs.

CYRUS M. SHELTON, Appellant

Appeal from Circuit Court of Sangamon County.

Opinion by Waggoner, J.

214 I.A. 654

In January 1916 appellee began working for appellant, and continued in his service until the first day of October of the same year. There is no disagreement in reference to the value or amount of services rendered, but the sole question in dispute is in regard to payment, and all the material testimony as to payment is given by the parties to the suit.

Appellant claims that about October 1, 1916, he paid appellee infull, and is flatly contradicted by appellee. Appellant states that appellee made no demand on him for the remaining portion of his wages until suit was begun, in a justice court, in July 1917. Appellee says he demanded his wages many times.

Counsel for appellant in his statement filed herein fails to point out errors relied upon for reversal as required by the rules of this court, and argues none except that "the court told the jury that

the burden of proof was on appellant to prove that payment had been made in full." The burden of proving payment was upon the appellant (defendant), and the instruction given by the court to that effect was correct.

Judgment Affirmed.

592a

Gen. No. 6991. OCTOBER TERM A. D. 1918 Ag. No. 51

J. Wesley Ford, et als., Appellees,

vs.

A. E. Junkens, et als., Appellants.

Appeal from Circuit Court of Vermilion County.

Opinion by Waggoner, J.

214 I.A. 654

The appellants were formerly engaged in the horse business with stables at Danville, Illinois, and at Homer, Illinois. On March 31, 1911, appellees bought from them a stallion, named Tonneau, and payed for him by giving two promissory notes each for the sum of $1000.-00, due respectively June 1, 1912, and June 1, 1913. Appellants sold the notes before maturity. At the time of the purchase of said stallion appellants gave appellees a bill of sale and contract that reads as follows:

"Homer, Ill., Mar. 31, 1911.

THIS CERTIFIES that in consideration of the sum of 2000.00 dollars Junkens & O'Neil of Homer, Champaign County, Illinois, have this day sold and delivered to J. Wesley Ford and W. H. Ford of Rossville, County of Vermilion, State of Illinois, the Imported Belgian Stallion named Tonneau No. in Stud Book (2721).

Junkens & O'Neil do hereby warrant the said stallion to be a 60 per cent foal getter (if bred to only a reasonable

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number of good breeding mares, said mares to be regularly returned, tried and bred), and if he should prove otherwise he shall and must be returned to Junkens &O'Neil at Homer, Illinois, and another stallion of same breed but of no greater value taken in his place.

Providing, however, that said stallion Tonneau No. 2721 shall have good, reasonable care and attention and be delivered at Homer, Illinois, on or before February 1, 1912, in as good condition as he is on this day of sale and the purchaser hereby assumes the risk of being able to so return said stallion and if unable to do so on account of death or otherwise no damage shall be recovered for a breach of the warranty. This contract to become null and void on and after February 1, 1912.

This bill of sale contains all the agreements of warranty or guaranty made by us in the sale of the above mentioned stallion, and it is expressly provided that we shall not be liable for any claim that may hereafter be made alleging any verbal agreement of ourselves or our salesmen in the sale of said horse.

We hereby agree to above bill of sale and warranty.

J. WESLEY FORD,
W. H. FORD,
Purchasers."

JUNKENS & O'NEIL,
By Junkens & O'Neil Manager.

When the bill of sale and contract was made, at Homer, the horse Tonneau was at Danville. Appellees

afterwards went to Danville; got the horse; shipped him to Rossville, and from there took him to their farm on April 5, 1911.

By terms of the bill of sale and contract appellants

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warranted Tonneau to be a "60% foal getter," under the conditions therein enumerated, and if he proved otherwise was to be returned to Junkens & O'Neil, at Homer, Illinois, in as good condition as he was on the day of sale, and another stallion of the same breed, but of no greater value, taken in his place.

After appellees had used the horse one season they told appellants they were going to return him because he did not get the required per cent of colts, and appellants said they would give appellees another horse.

On January 29, 1912, appellees took the horse Tonneau to appellant's stable at Danville, and testify that they told appellants they had returned the horse according to contract; that appellants looked at the horse; said they did not have a stall in the barn, everything was full; asked appellees to lead the horse down to the barn of Vern Jones (a block away) and sent one of their employees, Joe Ryan, with them to the Jones barn where the horse was left.

Appellant Junkens denies accepting the horse, but testified the horse was very thin in flesh; had several sores on him; was lame and was four or five hundred pounds lighter in weight than when received by appellees. Appellant Junkens further says that

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at this time he told appellees they (appellants) could not accept the horse in that condition on another horse; was willing to furnish them another horse, but that this horse would have to be brought back in the same condition he was in when appellees got him; that he (appellant Junkens) did not tell appellees to take the horse to Vern Jones' barn, nor did he send Joe Ryan with them. Vern Jones testified that Ryan did not come with appellees to his barn when Tonneau was brought there, and Joe Ryan testified that he did not go. Junkens is corroborated in what he says occurred at his and O'Neil's barn as to the condition of the horse and as to what was said at the time in question, by Joe Ryan and George Benjamin, two employees. Appell-

ants contention, in brief, is that they refused to take Tonneau back, and thereupon appellees put him in Jones' stable, where he remained until sold for a feed bill the latter part of the next November. Appellees testify that after leaving Tonneau at Jones' stable they went back to appellants' stable, and there left, until the next morning, the bridle and blanket taken off from Tonneau and a whip. It is admitted that the appellees, the next day after bringing Tonneau back, were by appellant Junkens shown several other stallions then then in appellants' stable. Appellee W. H. Ford testified that when they looked at the stallions Junkens said they

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(appellants) did not have anything that would satisfy us right then, and further said, "We will get something and let you know." The record shows nothing as having taken place between the parties from January 29, 1912, until August 3, 1912.

Appellees, a short time prior to August 3, 1912, went to appellants' stable at Homer, and there saw a stallion called Burgoyne that was satisfactory to them. How they came to go at that time is not disclosed by the evidence. On August 3, 1912, appellants gave appellees a bill of sale and contract for Burgoyne containing provisions like those in the contract of March 31, 1911. At the same time appellees gave appellants a bill of sale stating that they had that day sold and delivered to appellants the stallion Tonneau. The last two writings were executed at the same time, at Danville. Tonneau was at the stable of Vern Jones, where he remained until the latter part of November 1912, when he was sold for the non-payment of a feed bill. The stallion Burgoyne was then at appellants' stable at Homer, where he remained for the next six months, and was then sold by appellants to George Stormer.

The declaration filed, in this case, consisted of the common and three special counts. The plea was the general issue.

On the trial in the Circuit Court the jury returned a verdict

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in favor of appellees for $2583.33 and judgment was entered thereon.

The obligations of the parties, each to the other, are to be determined by the provisions of the written contracts entered into by them. Appellants in the bill of sale and contract dated March 31, 1911, did not agree to give appellees a second stallion with a warranty of any kind, but "another stallion of the same breed but of no greater value" than the first. In other words, if there was a failure of the warranty of the first stallion, appellees had a right to return him to appellants at Homer, Illinois, and get a second stallion of the same breed, but of no greater value, and that would be the end of the matter. Appellants did not have to deliver a second stallion, but appellees were required to go to Homer and get him.

The giving of a bill of sale for Burgoyne and the acceptance of a bill of sale, from appellees, for Tonneau was an acknowledgement on the part of appellants that there had been a breach of warranty of Tonneau and a waiver of any right, on their part, to refuse to take him back on account of any defective condition.

By virtue of the terms and delivery of the bill of sale and contract Burgoyne immediately became the property of appellees (24 Am. and Eng. Ency of Law (2nd Ed.) Pg. 1045; Ency of Evidence Vol. 11 pg 577;) and gave them a right to take possession of him. (Fitzgerald v Andrews, 15 Neb. 52 (55); 35 Cyc. Pg. 163). They should have

gone to Homer to get Burgoyne (Meechem on Sales Vol. 2. Sec 1124; 35 Cyc 172; 24 Am. and Eng Ency of Law (2nd) Pg. 1069) but their failure so to do did not divest them of their ownership. When appellants sold Burgoyne to George Stormer they sold a horse that belonged to appellees. The bill of sale given appellants, for Tonneau, had a like effect as that given them for Burgoyne. They became the owners of Tonneau and entitled to possession of him, if he was not already in their possession as was found by the jury, which finding we would not be disposed to set aside. Where property is already in the possession of the buyer, nothing more than the unconditional and completed contract of sale is necessary. (Meechem on Sales Vol 2. Pg. 1046; 24 Am. and Eng. Ency of Law Pg's 1068-9.)

The court instructed the jury that "if you find a verdict for the plaintiffs, the measure of their damages will be the sum of $2000.00 with interest at the rate of five per cent per annum from the time the horse Burgoyne should have been delivered to the plaintiffs, under the evidence, if you find said horse should have been so delivered." To give this instruction was error. The evidence shows that on February 24, 1913, appellants sold Burgoyne. If appellees are entitled to recover the measure of damages would be the fair cash market value of the horse, less a proper compensation

to appellants for keeping such horse, if claim was made for such compensation.

The court erred in admitting the testimony of appellees that appellant Junkens said he would ship Burgoyne to Tab, Indiana. Appellant, Junkens, denies making such a statement and if he did it is passing strange that appellees never requested him to comply with his promise. The statement, if made, was prior to the execution of the bills of sale and contracts and was therefore inadmissible. Telluride Power Co. v Crane Co. 208 Ill. 218 (227).

Instructions numbered seven and eight, given on behalf of appellees, being based on their oral testimony in reference to the shipment of the horse to Tab, Indiana, should not have been given.

The judgment of the Circuit Court is reversed and this cause remanded.

Reversed and Remanded.

593a

Gen. No. 6995. OCTOBER TERM A. D. 1918. Ag. No. 54.

G. A. DETERDING, Appellee

vs.

CENTRAL ILLINOIS PUBLIC SERVICE CO.,

Appellant

214 I.A. 654

Appeal from the Circuit Court of Christian County.

Opinion by Waggoner, J.

This is a suit brought by appellee against appellant to recover damages sustained in the years 1914 and 1915, by resaon of a dam built across a natural water course, by appellant, causing water to back up on appellee's land, making it wet, swampy, unproductive, untillable and damaging his crops.

Appellant offered no evidence. There was no evidence, other than that of appellee, as to damages done his crops. He testified that in the summer of 1914 the fields of corn and wheat were not flooded from the time they were planted until harvested; that there was no time after the corn was growing in 1914 that water was spread out all over the corn field; that no portion of the corn crop of 1914 was totally destroyed, but the yield was reduced about thirty per cent. The court then asked, "What is the rental value?" Appellee replied $10.00 per acre. With this evidence before the jury, in reference to the crop

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of 1914, the court gave the following instruction:

"The court instructs the jury that if you find from a preponderance of the evidence that the act of the defendant in building the dam in question caused the plaintiff's crop of corn in 1914 to be injured, then the rule of damages to be followed is the fair cash rental value of the land.'

This instruction is errouous. If the yield was only reduced thirty per cent, appellee would not be entitled to recover the full rental value of the land.

The court refused to give, when asked by appellant, the following instruction:

"The court further instructs the jury that the plaintiff has alleged in his declaration that the dam in question caused the water to back up, overflow, damage and injure his crop, and you are further instructed that before the plaintiff is entitled to recover he must prove that allegation by a preponderance of the evidence."

This instruction is correct, and should have been given.

On account of error in giving the instruction first above mentioned, and the refusal to give the other, this cause is reversed and remanded.

Reversed and Remanded.

594a

GEN. NO. 6926 APRIL TERM, A. D. 1918. AG. NO. 70.

Clarence Prevo, Appellee

vs

Paul Kuhn & Company, Appellant

Appeal from Circuit Court Clark County.

214 I.A. 654 5

ELDREDGE J.

Clarence Prevo, appellee, brought suit against Paul Kuhn & Company, appellant, in an assumpsit to recover the balance due him on a sale of 1,000 bushels of corn made in the month of September, 1916.

Appellee is a farmer residing near Walnut Prairie and appellant is a grain merchant with its principle office in Terre Haute, Indiana, but operates grain elevators at railroad stations at several points in Illinois, one such elevator being at Walnut Prairie and another at Synder, Ill. Hiram Hilbert is also a farmer residing near Walnut Prairie. In the month of September 1916, Hilbert had sold a quantity of corn to appellant for 65 cents per bushel, the market price of corn being at that time 63 cents per bushel. Appellee, upon becoming acquainted with this fact, asked Hilbert if he could sell some corn for him to appellant for the same price. Hilbert replied that he thought he could do so and in fact, shortly thereafter did make a contract with appell-

ant for appellee's corn at 65 cents per bushel. The controversy in this case arises over the quantity of corn sold by appellee to appellant through Hilbert. Appellee claims that he only authorized Hilbert to sell 1,000 bushels of corn while Hilbert testified that appellee requested him to sell 1,500 bushels of corn to appellant and that he made the contract on behalf of appellee with appellant for that amount. Appellee delivered 1,000 bushels of corn to appellant and refused to deliver any more. Appellant had paid him from time to time on the corn as delivered the sum of $250.25 leaving a balance due on the 1,000 bushels delivered the sum of $399.75 Appellee delivered the last of the 1,000 bushels on the 7th day of April, 1917. The price of corn had advanced rapidly and, at the time of the last delivery the market price was $1.25 per bushel. Appellant, by its pleadings, claimed a set-off for the failure of appellee to deliver the other 500 bush-

els of corn. The whole controversy rests upon the question of fact as to whether appellee authorized Hilbert to sell 1,000 bushels of corn to appellant or 1,500 bushels. The evidence is conflicting with some facts and circumstances tending to corroborate Hilbert's testimony as to the terms of the contract and some to corroborate appellee in regard thereto. The jury saw and heard the witnesses and its verdict has been approved

by the trial court and, under these circumstances, the judgment will not be disturbed on the ground that the verdict is contrary to the manifest weight of the evidence.

The only other error presented for our consideration is submitted to us in the following words: "We believe that the instructions offered by appellant and marked (Refused' by the Court, should have been given, and that in so doing the Court committed reversible error in that respect." We have repeatedly held that we cannot pass upon omnibus assignments of error of this character.

The Judgment of the Circuit Court is affirmed.

595a

GEN. No. 6945. OCTOBER TERM, A. D. 1918. Ag. No. 5.

Julius O. Carls, Appellant.

vs

Gus A. Carls, A. E. Schmoldt and Charles Schneider, Appellees.

Appeal from Circuit Court of Cass County.

214 I.A. 655

OPINION BY WAGGONER, J.

This is an action on the case brought by appellant, Julius O. Carls, against the appellees, Gus A. Carls, A. E. Schmoldt and Charles Schneider, to recover damages for the destruction of crops upon appellant's land caused by the removal of a water trap from the junction of two streams, and thereby permitting water to back up one of them over and upon his lands, and in permitting such junction point thereafter to remain without a water trap.

At the time of the removal of the water trap appellees were, and now are commissioners of Clear Creek Special Drainage District, but this suit was instituted against them as individuals and not against the district

The declaration filed consists of four counts. In the first count it is alleged that appellant is the owner of the northwest quarter of the northeast quarter of Section Thirty-one, in Township Eighteen North, Range Eleven West, Cass County, Illinois; and of

the southwest quarter of the southeast quarter of Section Thirty adjoining it; that in the year 1905 Clear Creek Drainage District was organized for agricultural purposes; that the plans of such district provided for dredging and widening Clear Creek; that the said northwest quarter of the northwest quarter of Section Thirty-one was included in the district, but the other quarter was not; that in a state of nature all surface water collecting upon appellant's land lying above said district flowed in a natural water course known as Bluff Springs Branch, which connects with and enters into Clear Creek, another natural water course, and that the natural drainage was sufficient to enable appellant to raise crops on the last mentioned tract of land; that before the organization of said drainage district a water trap was placed at the junction point of the two creeks to prevent water that collected

in Clear Creek from backing up the other creek and then over appellant's land; that the water trap served its purpose; that appellees, acting as drainage commissioners, in the year 1915 dredged and enlarged Clear Creek and knew of the existence of the trap, its location and the purpose it served; that they carelessy and negligently permitted the junction point thereafter to be and remain without a trap, although repeatedly notified to replace the same and of the danger of overflow of back water upon the lands of

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appellant on account of the negligent and careless removal of the trap; that in the month of May 1916 crops were growing upon said lands; that on account of the removal of the water trap, water backed from Clear Creek into Bluff Springs Branch, flooded appellant's land and destroyed his crops.

The second count charges that appellees wilfully, wantonly and knowingly tore out and removed the water trap and permitted the point where Bluff Springs Branch enters into Clear Creek to be and remain without any water trap or system of drainage whereby Clear Creek would be prevented from backing into Bluff Springs Branch and thence on to appellant's land.

The third count charges that appellees as commissioners of Clear Creek Special Drainage District carelessly, negligently and improperly performed the work of dredging and enlarging the natural water course known as Clear Creek and on account thereof, appellant's lands were flooded and his crops destroyed.

The allegations of the fourth count are practically the same as those contained in the third. Issue was joined on a plea of general issue, the case heard before a jury, which returned a verdict for the appellees and judgment was rendered thereon in bar of the action. In the Brief for Appellant it is stated that this appeal has been perfected and is prosecuted to the end that a reversal

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may be had on account of erroneous instructions given for appellees and for the refusal, by the trial court, to give proper instructions offered by appellant.

The issues, in this case, are not at all complicated and the court should not have been asked to pass upon forty-four instructions, twenty-four of which were sub-

mitted by appellees. Chicago Athletic Association vs. Eddy Electric Mfg. Co., 77 Ill. App. 204 (212-213); La-Salle Co. Carbon Coal Co. v. Eastman, 99 Ill. App. 495 (498). The errors assigned apply to twenty-eight of the instructions. To discuss all the alleged errors would make this opinion of unwarranted length. We shall only consider a few of the instructions which we consider clearly erroneous, but in so doing we neither approve or condemn the others.

Instruction number two, given for appellees, tells the jury that "the burden of proof is upon the plaintiff to prove each and every material allegation in the declaration by a preponderance of the evidence", and directs a verdict. The declaration contains four counts, and plaintiff in order to recover should not be required to prove the material allegation in each of the counts. Harvey v. C. & A. Ry. Co., 116 Ill. App. 507 (509). It is sufficient to

prove the material allegations of any one count.

Instruction number nine, given for appellees, in which the jury are told that the only duty of the commissioners, under the Farm Drainage Act, is to provide main outlets of ample capacity for the waters of the district, having in view future contingencies and present, has no application to the facts in this case, where appellees are charged specifically as individuals with the negligent and careless removal of a water trap. Tearney v. Smith, 86 Ill. 391; Young v. Commissioners of Highways, 134 Ill. 569 (581); Harris v. Carson, 40 Ill. App. 147; Skinner v. Morgan, 21 Ill. App. 209.

Instructions numbered ten and thirteen, are both erroneous for the reason that it was not necessary to prove intentional negligence but only the negligence charged.

Instructions number thirty-three and thirty-four, asked by appellant, are the law as predicated upon the issues raised by the pleadings and both should have been given. Instruction number sixteen is erroneous, as appellee fails to show any evidence in the record on which to base it.

It is hoped that on a new trial of this case the attorneys, for the respective parties, will take more care in preparing their instructions, and will not again impose upon the court by requesting such an unreasonable number to be given.

For the errors indicated the judgment of the circuit court will be reversed and the cause remanded.

Reversed and Remanded.

Estabrook

(5762)

GEN. NO. 7009. APRIL TERM A. D. 1919 AG. NO. 17

Lewis A. Abdill, Appellee

vs

Walter A. Abdill, administrator with the will annexed of the estate of George W. Abdill, deceased

Appellant

214 I.A. 655

Appeal from the Circuit Court of Vermilion County.

OPINION BY WAGGONER, J.

This is an action of assumpsit brought May 2, 1918, in the circuit court of Vermilion County by appellee, Lewis A. Abdill, against appellant, Walter A. Abdill, administrator with the will annexed of the estate of George W. Abdill, deceased. The declaration contained the common counts, and there was filed the following bill of particulars: "Defendant to plaintiff debtor for the purchase price of all coal, minerals and mineral substances under the surface of the N. E. quarter 8-19-12 W. Vermilion County, Illinois, by virtue of warranty deed made by plaintiff to George W. Abdill, dated April 28, 1891, and recorded in Deed Record 111, page 131, of the Deed Records of Vermilion County, Illinois."

A plea of general issue and a plea of the statute of limitations alleging that the cause of action did not accrue within five years

next preceding the commencement of the suit, were filed. To the latter plea appellee filed three replications, in one alleging that the cause of action did accrue within such five years, and in each of the others alleging a new promise on the part of the said George W. Abdill to pay the debt, within five years next preceding the commencement of the suit. Appellant filed the usual rejoinders. The cause was tried by a jury, which returned a verdict in favor of appellee for $16,000.00, and judgment was rendered thereon.

Appellee offered in evidence a warranty deed dated April 28, 1891, from himself to said George W. Abdill, conveying for an express consideration of $7000.00, all the coal, minerals and mineral substances under the surface of said land.

Appellee also offered in evidence a warranty deed of the same date from said George W. Abdill and other grantors, conveying to the Middlefork Coal Company, for a

consideration of $66,000.00, all coal, minerals and mineral substances under the surface of a large amount of land, therein described, including that described in the bill of particulars which was taken by the grantees, as stated in the last mentioned deed, at a valuation of $7000.00. This deed was also recorded on May 11, 1891, in the Recorder's office of Vermilion County. These two deeds were made on the same day,

acknowledged before the same Notary Public, and so far as the coal, minerals and mineral substances are concerned were made for the same consideration.

John Redmond testified, as shown by the abstract, that in the summer of 1914 he was in the office of George W. Abdill; that appellee came in and said he had just come from Mr. Acton's office; that he was offered $16,000.00 for the coal underlying his land, "but as he was tied up in that shape he could not make any deed; * * * he (appellee) was cursing and damning about the condition he was tied up in and making a whole lot of noise about it and cursing and damning about being in that shape and having had an offer he could not make any sale by reason of being tied up with that deed. George W. Abdill listened to his (appellee's) noise awhile, and finally arose and said "that is enough, young man, I will see that you get paid for that coal as much as you are offered." The record shows that this alleged offer of $16,000.00 was made by the attorney examing this witness, attorney for appellee in this case, and that both of the deeds hereinbefore mentioned had been recorded in the Recorder's office of Vermilion County in 1891. It is difficult to understand why an attorney would offer to pay $16,000.00 for coal to a person who did not own it. In appellee's

brief, written by the attorney in question, it is said that "in this case the records were not searched, but the party desiring to purchase the coal and seeing Lewis Abdill in possession of the surface and not knowing that he had sold the coal made him an offer of $16,000.00."

It was stated to the witness John Redmond that this suit was begun on June 3, 1918, and he was then asked

this leading question: "Within five years prior to that time did George W. Abdill ever tell you that Lewis had not been paid for the coal that he deeded to him under the one hundred and sixty acres?" To which question the witness answered, yes * * * he (George W. Abdill) said that he (appellee) had not been paid; that he (George W. Abdill) had not paid him. Such a statement, even if accompanied by a promise to pay, would not revive a debt barred by the statute of limitations, for the reason that it was made to a stranger and not to the party claiming the indebtedness. Collar v. Patterson, 137 Ill. 403 (409); Wachter v. Albee, 80 Ill. 47 (50); McGrew v. Forsythe, 80 Ill. 596 (597).

If a recovery can be hadi n this case it must be for the purchase price of the coal, minerals and mineral substances conveyed by deed on April 28, 1891, by the appellee to George W. Abdill, as set forth in the bill of particulars, together with interest thereon,

and not $16,000.00.

The only evidence as to the purchase price is the consideration stated in the deed. George W. Abdill bought such coal, minerals and mineral substances from appellee and on the same day conveyed what he had acquired to the Middlefork Coal Company for a like sum. A right to recover such purchase price is barred by the statute of limitations unless such bar has been removed by a parol promise, made by George W. Abdill which removed the bar and thereby revived the debt. A promise to pay a debt barred by the statute of limitations, only removes the bar and leaves the case to be proved as if no statute of limitations had been pleaded. Kimmel v. Schwartz, Breese 216 (218); Keener v. Crull, 19 Ill. 189 (191).

Does the statement made by George W. Abdill in 1914 to appellee, who was claiming to have been offered $16,000.00 for the coal and other products underlying the land, "I will see that you get paid for that coal as much as you are offered," revive a debt incurred twenty-three years prior to that time? From anything appearing in this statement appellee may have received the $7000.00 and George W. Abdill was going to undertake to have him paid another or additional sum. George W. Abdill does not say that he will pay appellee anything. Appellee says, in his brief, that a party desiring to purchase the coal without searching the record and not

knowing he had sold it made him an offer of $16,000.00. If appellee had told this party that he had sold the coal and made a deed therefor, which was recorded, would the offer have remained long enough for him to get to George W. Abdill's office and tell him about it, or would the offer have been immediately withdrawn. What amount did George W. Abdill, by the statement attributed to him, obligate himself to pay? An acknowledgment and promise to pay a debt, in order to avoid a bar of the statute of limitations, must fix the amount due, and show a present unqualified willingness to pay it. Waldron v. Alexander, 136 Ill. 550 (562); Ward v. Jack, 172 Pa. St. 461; Ennis v. Pullman Palace Car Co., 165 Ill. 161 (175-6). If the statement be equivocal, vague or indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, it ought not to go to the jury as evidence of a new promise to revive the cause of action. (17 R. C. L. Pg. 898, and cases cited in note 3.) The statement in question can not be construed to be a promise to pay a pre-existing debt. Appellee did not accede to the alleged promise nor act upon it for four years and until after George W. Abdill's death.

When a party permits a debt to run, making no effort to collect it until the statute of limitations can be plead in bar of

the action, he is in no position to call upon a court to aid him upon slight proof; on the contrary, the evidence ought to be clear and satisfactory to overcome the bar of the statute. Wachter v. Albee, 80 Ill. 47 (51); Harden v. Whitman, 209 Ill. App. 106 (109); Neustacher v. Schmidt, 25 Ill. App. 626 (632). The evidence of a new promise is wholly insufficient to take this case out of the statute of limitations.

In the first instruction, given on behalf of appellee, the jury was told in substance that if they found (and they were not required so to find from the evidence) that there was no express agreement as to the amount that the appellee was to be paid for the deed; and further found from a preponderance of the evidence that George W. Abdill within five years before the bringing of this suit verbally promised to pay appellee a certain sum for said deed, and that appellee agreed to accept the sum so agreed to be paid by George W. Abdill in full satisfact-

ion of the indebtedness, then the amount so agreed ($16,000.00) would be the amount that appellee was entitled to recover in this case. The consideration of $7000.00 stated in the deed was prima facie evidence of an express agreement of the amount to be paid therefor, and there was no evidence tending to overcome such prima facie showing. There was no evidence of

any agreement made within five years before the commencement of this suit to pay any other sum, nor evidence of any agreement on the part of appellee to accept a sum agreed upon in full satisfaction of the indebtedness. Instructions must be based upon the evidence, and this instruction was erroneous.

The judgment of the circuit court is reversed, and we find that the original debt claimed is barred by the statute of limitations, and that the evidence of a new promise, shown in this case is wholly insufficient to remove the bar and entitle appellee to recover.

Reversed.

(37/a)

GEN. NO. 7018. APRIL TERM A. D. 1919. AG. NO. 20.

John W. Luttrell, Plaintiff in Error

vs

Charles E. Wyatt, et als, Defendants in Error

Error to Circuit Court of Sangamon County.

OPINION BY WAGGONER, J.

214 I.A. 655 3

The plaintiff in error, John W. Luttrell, filed his bill in chancery on August 16, 1917, to impeach a decree entered December 22, 1914, for fraud, in that he was induced and failed to make a defense which he had thereto, on account of the fraudulent representations of the defendant in error, Charles E. Wyatt.

The plaintiff in error alleges that on October 3, 1914, Charles E. Wyatt and Margaret J. Wyatt, his wife, filed their bill against John W. Luttrell and Ralph Luttrel for an injunction restraining an action at law upon a promissory note. The bill for an injunction, an amendment thereto making Henry L. Child, a defendant, the answer of Ralph Luttrell and John W. Luttrell by Henry L. Child, their solicitor, the answer of Henry L. Child, the replication to said answers, the report of the master in chancery and the final decree granting the injunction are set forth verbatim in the present bill and cover forty type written pages.

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The substance of the present bill may be stated as follows: Charles E. Wyatt and wife in their bill against John W. Luttrell and Ralph Luttrell for an injunction alleged that on December 31, 1913, they executed two non-negotiable notes payable to Ralph Luttrell, trustee, for $526.25 each, one due six months and the other several months later. That a suit is pending at law on the first note in which Ralph Luttrell is plaintiff and Charles E. Wyatt and wife are defendants. That Charles E. Wyatt is a nephew of John W. Luttrell and that John W. Luttrell is the father of Ralph Luttrell. That on September 30, 1912, John W. Luttrell loaned fifteen hundred dollars to Fred S. Wyatt, a brother of Charles E. Wyatt, and Fred S. Wyatt, to secure it, executed a promissory note and mortgage on real estate in Garfield, Oklahoma. That in December 1913, it was discovered that Fred S. Wyatt had no interest in the property. Charles E. Wyatt claims that Ralph Luttrell represented that unless he, Charles E. Wyatt, paid said debt he, Ralph Luttrell, would see to it that Fred S. Wyatt was brought back

from Oklahoma and prosecuted for the confidence game, and that he, Charles E. Wyatt, was then in poor health, his mother in her last illness, and he was made to believe that unless he paid the money his brother would be returned and prosecuted criminally. Charles E. Wyatt claims because thereof he executed the two promissory notes for $526.25 each and induced his

wife to join with him in their execution and in addition thereto paid a large sum of money to Ralph Luttrell. That John W. Luttrell and Ralph Luttrell surrendered to Charles E. Wyatt the note and mortgage of Fred S. Wyatt; that the same were of little or no value. Charles E. Wyatt claims he received no substantial consideration for said notes. That John W. Luttrell was the sole beneficiary of said notes and was legally competent to transact business. That Ralph Luttrell named him as trustee merely to please him and that he was a mere agent or passive trustee, and John W. Luttrell the real owner. Charles E. Wyatt claims that at various times he advanced money to his uncle, John W. Luttrell, and that by reason of such generosity and by reason of the fact that Charles E. Wyatt received no consideration for said notes, John W. Luttrell became disinclined to enforce the payment of said notes and so expressed himself to Charles E. Wyatt. That in accordance therewith and on July 10, 1914, John W. Luttrell surrendered and endorsed one of said notes to Charles E. Wyatt intending to discharge Charles E. Wyatt and his wife, said note being the one sued upon, and that at said time Charles E. Wyatt gave John W. Luttrell $35.00 in cash, and has since made gifts and presents to him. That thereafter Ralph Luttrell demanded possession of said note and upon said demand being refused Ralph Luttrell brought suit on August 3, 1914, on said note and said action is now pending. That shortly thereafter John W.

Luttrell stated that he did not wish said suit further prosecuted and that by reason of the many favors he had received from Charles E. Wyatt wished to surrender and release all rights in both of the notes. That on September 28, 1914, for a valuable consideration John W. Lutrell executed a release whereby he fully released Charles E. Wyatt and wife from any and all liability, claims or demands whatever on account of said purported

promissory notes or either of them. That notwithstanding said release Ralph Luttrell is still maintaining said action on said note and threatens to prosecute the same. Inasmuch as Charles E. Wyatt and wife claim that said release by the equitable owner is not available in the suit at law and that the only remedy is in equity, they pray that Ralph Luttrell may be restrained by the writ of injunction from further prosecuting said action at law on said note, and that he be ordered to surrender the same to Charles E.Wyatt and wife.

The answer of Ralph Luttrell and John W. Luttrell by Henry L. Child, their solicitor, set up in the bill, is in substance as follows: Admits that John W. Luttrell loaned money to Fred S. Wyatt as alleged. Denies that Ralph Luttrell was named as trustee in sale notes solely to please him, but alleges that it was at the suggestion of Charles E. Wyatt because John W. Luttrell was old and incapable of properly handling his money. Admits that the mortgage on the Oklahoma land was

worthless. Denies that Ralph Luttrell represented that a criminal prosecution would be instituted against Fred S. Wyatt if the money was not paid by Charles E. Wyatt. Alleges that Charles E. Wyatt and wife executed said notes to take up the Oklahoma mortgage, and denies that it was done under any threat of prosecution. Denies that John W. Luttrell is the sole owner of said notes; denies that John W. Luttrell is legally competent to transact business; alleges the notes were made to Ralph Luttrell as trustee at the suggestion of Charles E. Wyatt who knew that John W. Luttrell was not competent to transact business but was a spendthrift. Avers that on July 23, 1914, Ralph Luttrell and John W. Luttrell entered into a contract with Henry L. Child, an attorney, employing him to collect said notes. Alleges that the note on which said action at law was brought was not surrendered to Charles E. Wyatt but was delivered to him to secure a loan of $35.00 Denies that John W. Luttrell had any power to execute and deliver the release, denies he received any consideration therefor; denies that he had power or authority to satisfy said notes and alleges that said notes have not been paid or satisfied.

Charles E. Wyatt and wife amended their bill by making Henry L. Child a party defendant, alleging that

he claimed an interest in said note by virtue of an agreement for attorney fees for prosecuting the action at law. Henry L. Child filed his answer setting up that he

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was employed under a written contract, as an attorney, to collect said notes and that one of them was delivered to him to secure his attorney fees.

The master in chancery filed his report finding that the allegations of the bill of Charles E. Wyatt and wife are true. That Henry L. Child is entitled to an attorney fee of $100.00, and that on said fee being paid said notes should be surrendered to Charles E. Wyatt; that Ralph Luttrell and John W. Luttrell should be restrained from collecting said notes. A decree was entered December 22, 1914, in accordance with the findings and report of the Master-in Chancery.

John W. Luttrell alleges that the decree entered in the foregoing injunction suit should be now reviewed and set aside on account of the acts and conduct of Charles E. Wyatt which constituted such fraud as rendered the decree null and void. That Charles E. Wyatt for a long time prior to and during the pendency of said injunction suit was guilty of fraudulently winning the confidence of plaintiff in error, John W. Luttrell, and misleading him and causing him to wholly fail to defend the injunction suit at a time when by reason of age and feebleness in mind and body he was suffering from mental weakness and infirmity and was wholly unable to protect himself. That plaintiff in error, John W. Luttrell, in September 1912, loaned $1500.00 to Fred S. Wyatt and accepted the mortgage on Oklahoma land as security.

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That Charles E. Wyatt befriended plaintiff in error John W. Luttrell and gained his confidence. That under a power of attorney from plaintiff in error, Charles E. Wyatt has recently secured said money from an estate; that plaintiff in error being feeble in mind, uneducated and without business experience confided and trusted Charles E. Wyatt who was engaged in the real estate business. That shortly after plaintiff in error secured said money Fred S. Wyatt, who was largely indebted to Charles E. Wyatt and resided in Oklahoma, asked for a loan and that plaintiff in error meet him at the office of Charles E. Wyatt. When plaintiff in error

went there Charles E. Wyatt had the papers already prepared, although plaintiff in error had not agreed to make the loan. That Charles E. Wyatt urged and advised him to make it and told him he would be perfectly secure with the mortgage his brother was giving. That Charles E. Wyatt prepared the papers without an abstract of title and prevailed upon plaintiff in error to withdraw his money from the bank and loan it. That Charles E. Wyatt kept all the papers in his possession until the loan became due when plaintiff in error by placing matters in the hands of an attorney discovered that Fred S. Wyatt had no title. That while plaintiff in error, under adviice of his attorney and the states attorney, was taking steps to have Fred S. Wyatt, indicted, Charles E. Wyatt of his own volition negotiated for the transfer of the notes and mortgage and paid $500.00

and executed to him the two notes in question. That neither plaintiff in error nor his son made any threats to secure the same. That the notes were given for a valuable consideration and were valid and binding. That when the first note became due plaintiff in error demanded payment and was promised payment on July 15. That Charles E. Wyatt loaned $35.00 to plaintiff in error on condition that one of the notes be turned over to him as security. That plaintiff in error having confidence in Charles E. Wyatt delivered said note to him as security for said $35.00, and that Charles E. Wyatt afterwards tried to get plaintiff in error to swear that Charles E. Wyatt had bought the note for $35.00.

That afterwards Charles E. Wyatt, by false and fraudulent representations and false pretentions of friendship, secured the confidence of plaintiff in error and caused him to believe that his son ,Ralph Luttrell. was endeavoring to secure the money on the notes for himself, and that if Ralph Luttrell ever got the same plaintiff in error would never get it. That the only way plaintiff in error could ever get it was to help Charles E. Wyatt defeat the suit brought by Ralph Luttrell. That to make plaintiff in error believe these representations Charles E. Wyatt pretended great friendship for him, and on several occasions gave him small sums of money and treated him. That he (Charles E. Wyatt) repeatedly told plaintiff in error that

he had the money ready to pay him, but that if he (Charles E. Wyatt) paid him before he had beaten the suit brought by Ralph he might have to pay it again. That Charles E. Wyatt repeatedly told plaintiff in error that Ralph Luttrell was looking for him to have him (plaintiff in error) arrested and he had better not stay in Springfield, all of which was false and known to be false by Charles E. Wyatt. That on one occasion Charles E. Wyatt told plaintiff in error that they were looking for him and that he, Charles E. Wyatt, would accompany him to the station to see that he got out of town safely. That Charles E. Wyatt did so accompany plaintiff in error, as plaintiff in error believed, to protect him from arrest. That Charles E. Wyatt repeatedly told him that he (plaintiff in error) should not go near or consult with his lawyer, Henry L. Child, for the reason that Henry L. Child was trying to help Ralph Luttrell get the money away from plaintiff in error. That on account of these representations plaintiff in error refrained from consulting with Henry L. Child and also became suspicious of his son Ralph, and would not listen to his advice but relied wholly upon the advice of Charles E. Wyatt as to what he, plaintiff in error, should do to secure said money. That Charles E. Wyatt, knowing the confidence of plaintiff in error in him, advised and directed plaintiff in error what he should do; that he, Charles E. Wyatt, advised plaintiff in error that in order to keep Ralph Luttrell

from getting the money it would be necessary to bring an injunction suit, that in order to do this it would be necessary for plaintiff in error to sign a paper to secure the injunction. That Charles E. Wyatt had his attorney prepare a paper for plantiff in error to sign. That plaintiff in error went with Charles E. Wyatt to Wyatt's lawyer's office where without any consultation with Henry L. Child, who was then attoreny in the suit on the note, a paper was read over by the attorney of Charles E. Wyatt; that plaintiff in error had been given to understand, by Charles E. Wyatt, that the paper was to secure an injunction against Ralph Luttrell, and had not been notified it contained anything else. That at the time it was read

plaintiff in error was very feeble and infirm, an old man, blind in one eye and almost so in the other; that plaintiff in error was uneducated, unlearned and understood but little of what was read to him, and from the previous explanations made to him and from what he understood from the reading he thought it was a request for his son Ralph Luttrell to be enjoined from collecting the note and for the matter to be left to be settled out of court between him and Charles E. Wyatt. That plaintiff in error did not understand that he was releasing Charles E. Wyatt but believed and relied upon the promise of Charles E. Wyatt that he would settle with him and pay him when his son was enjoined. That he received nothing of value for signing the paper. That after

the paper was signed and delivered, without explanation, Charles E. Wyatt gave plaintiff in error one dollar which plaintiff in error took to be an act of kindness. That after signing said paper plaintiff in error voluntarily came from Morgan County and submitted to be served with summons in said injunction suit. That after signing said paper and in the month of October or November plaintiff in error was again assured by Charles E. Wyatt in the presence of a friend that he would pay him his money just as soon as he got rid of Ralph Luttrell's suit. That Charles E. Wyatt then told plaintiff in error not to confer with Henry L. Child and to get out of town at once for fear they would have him arrested. That shortly before December 3, 1914, Charles E. Wyatt sent plaintiff in error $5.00, and told him to come to Springfield on December 3, 1914, and bring three good witnesses to testify. That plaintiff in error went on that day with his witnesses to the office of Charles E. Wyatt, told him he was ready for trial and was going to have the money. That Charles E. Wyatt said he did not believe they could hear the case that day and he would go to his lawyer's office and find out. That Charles E. Wyatt returned shortly and said we can not hear the case today, and you had better go home. That Charles E. Wyatt did not inform plaintiff in error that the evidence would be taken the next day or for him to return. That the evidence was taken the following day. That Charles E. Wyatt was the

only witness for the complainant in said injunction suit and that the evidence for the defense was taken on the same date. That plaintiff in error had no notice whatever of the taking of testimony and knew nothing of the entry of the decree until long after the expiration of the term at which it was entered. That because of the representations of Charles E. Wyatt, plaintiff in error was led to believe that it was not necessary for him to do anything in the litigation and that he relied on the statements of Charles E. Wyatt that he would pay the money as soon as the suit of his son Ralph Luttrell was defeated and for that reason followed the advice and insistance of Charles E. Wyatt not to see his attorney and failed to make any defense in the injunction suit. That plaintiff in error was led to believe and did believe that the purpose of the injunction suit was to enjoin his son Ralph from collecting the money and did not know that it was for any other purpose and that after he learned that Charles E. Wyatt was claiming to have secured a release from him, that in the presence of plaintiff in error a friend asked Charles E. Wyatt if he had secured a release from plaintiff in error, and Charles E. Wyatt denied having done so, and then promised to pay the money in thirty days. That plaintiff in error relied upon the promise of Charles E. Wyatt to pay until he finally discovered that he did not intend to do so, and then for the first time discovered what had been done in the

injunction suit. The plaintiff in error prays that because of such fraudulent and false representations and conduct the decree in the injunction suit be set aside, the release held null and void and that the makers of the notes be required to pay the same.

Demurrers were filed and sustained to the bill, amendments were made ,and finally an amendment was filed as a substitute to the former amendments. This amendment alleges that Ralph Luttrell and John W. Luttrell on July 23, 1914, entered into a contract with Henry L. Child to bring a suit on the notes in question and agreed to give him twenty per cent of the amount collected as attorney fees. That complainant did not give Henry L. Child any additional authority to act for him and did not authorize him to represent him in the injunction suit and that plaintiff in error did not know

that Henry L. Child appeared for him in that case or filed an answer for him and did not know of the agreement on the part of Henry L. Child to accept $100.00 attorney fees and surrender the note until after the term of court was closed. That plaintiff in error did not authorize Henry L. Child, or any other person, to represent him and that because of the representations of Charles E. Wyatt plaintiff in error was led to mistrust his son Ralph and Henry L. Child and to believe the statements of Charles E. Wyatt, that his son and said attorney were trying to get the money on the notes away from plaintiff in error and that

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Charles E. Wyatt

was befriending him and was bringing the suit to prevent them from getting the money away from plaintiff in error, and for that reason he avoided conferring with his son and Henry L. Child. That Charles E. Wyatt entered into negotiations with Henry L. Child before the master in chancery and agreed to pay $100.00 attorney fees to Henry L. Child upon the entry of a decree cancelling the notes and enjoining their collection. That Charles E. Wyatt appeared before the master in chancery on the day following the date on which he sent plaintiff in error and his witnesses home and there heard Henry L. Child state to the master that he had been unable to get plaintiff in error to follow his advice or confer with him and that he was willing to turn over the last mentioned note if it was provided in the decree that the complainants pay him the sum of $100.00 attorney fees, and that said Charles E. Wyatt with full knowledge that he had led plaintiff in error to refuse to listen to the advice of Henry L. Child accepted the proposition and on the entry of the decree paid $100.00 to Henry L. Child. That Henry L. Child had no authority to represent plaintiff in error in the injunction suit, and that the acceptance of $100.00 attorney fees by Henry L. Child from Charles E. Wyatt and surrendering the note in question constituted collusion and was fraudulent and void in law, and that plaintiff in error is not bound thereby.

A demurrer was sustained to the bill, as amended, and it was

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dismissed. This writ of error is sued out to review the proceedings of the circuit court, and it is

assigned as error that the court erred in sustaining the demurrer to the bill, as amended, and in dismissing it.

This is a bill to impeach the decree, in the injunction suit, for fraud, and it may be filed at any time as a matter of right. Adamski v. Wieczorek, 170 Ill. 373 (374-5). Courts of equity have so often granted relief against judgments obtained by fraud, accident or mistake, where there has been no negligence on the part of a defendant that there can be no question of power or jurisdiction to afford a remedy in such a case. Miller v. Barto, 247 Ill. 104 (108); Ames v. Snider, 55 Ill 498 (501).

The defendant in error, Charles E. Wyatt, contends the demurrer was properly sustained because the bill does not allege facts showing fraud. He argues that the bill alleges that Charles E. Wyatt promised to pay the notes to John W. Lutrell just as soon as he could get rid of Ralph Luttrell's suit and thereby induced him to make no defense. He then says that to constitute fraud, a representation must relate to a past or existing state of facts ,and that a false promise can never amount to fraud. Murphy v. Murphy, 189 Ill. 360 (363-4); Grubb v. Milan, 249 Ill. 456)463).

It is true that in order to constitute fraud in law a

representation must be an affirmance of fact and not a mere promise or expression of opinion or intention. A promise to perform an act, though accompanied at the time with an intention not to perform it, is not such a representation as can be made the ground of an action for deceit. Keithley v. Mutual Life Ins. Co., 271 Ill. 584 (586-7). As distinguished from the false representations of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law nor does it afford a ground for relief in equity. Murphy v. Murphy, 189 Ill. 360 (364); Miller v. Sutliff, 241 Ill. 521 (526-7); 2 Pomeroy's Eq. Jur. Sec. 877. Pg. 1810.

However, there are well recognized exceptions to this rule. It has been frequently held, in this state, that where a grantor conveys land, and the consideration is an agreement by the grantee to support, maintain and care for the grantor during the remainder of his or her natural life, and the grantee neglects or refuses to

comply with the contract, the grantor may, in equity, have a decree rescinding the contract, setting aside the deed and reinvesting the grantor with the title to the real estate. A careful examination of these cases leads to the conclusion that the intervention of equity in such cases has been sanctioned in this state on the theory that the neglect or refusal of the grantee to comply with his contract

Page 16

raises a presumption that he did not intend to comply with it, in the first instance, and that the contract was fraudulent in its inception, wherefore a court of equity will not permit him to enjoy the conveyance so obtained. Stebbins v. Petty, 209 Ill. 291 (293).

In Fischer v. Fischer, 245 Ill. 426, a deed was set aside because of fraud in procuring it, where the fraud consisted of a wife's promise to treat her husband kindly and discharge her duty to him as his wife. The court concluding that the wife contemplated breaking the promise at the time she was importuning the husband to convey to her the property. For many like cases see 2 Pomeroy's Eq. Jur., Sec. 877, Note F, Pg. 1811.

In the case of Stodgell v. Garnett, 159 Ill. App. 301, a suit was instituted by Charles H. Garnett before a justice of the peace against Henry Stodgell. The justice of the peace rendered judgment against Stodgell, who appealed to the circuit court. While the appeal was pending, Garnett told Stodgell that he would dismiss the suit, and that he need not take any more notice of it. Stodgell relied upon the promise of Garnett to dismiss the suit and paid no more attention to it. Garnett appeared in circuit court and procured the appeal to be dismissed. Ten months afterwards Garnett sued out an execution from the justice of the peace. Stodgell did not know of this until the sheriff served the execution on him.

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Stodgell then filed a bill to enjoin the collection of the judgment. The court held that Stodgell had a right to rely upon the promise made by Garnett to dismiss the suit and inasmuch as the judgment was obtained by fraudulently dismissing the appeal, when Garnett had promised to dismiss his suit, Stodgell was entitled to an injunction.

In the case of Wierich v. DeZoya, 7 Ill. 835, a bill was filed for an injunction, to which a demurrer was sustained and the bill dismissed. The bill showed the complainants was served with a garnishee process; that he had a good defense but made none because the defendants told him they would dismiss the garnishment proceedings, and relying upon this assurance complainant paid no further attention to the matter, but that in violation of that agreement the defendants fraudulently proceeded and perfected their judgment against complainant as garnishee, and threatened to collect the judgment. The Supreme Court held this to be a clear case of fraud and reversed the decree.

It follows, from the foregoing authorities, that if Charles E. Wyatt induced John W. Luttrell to make no defense to the injunction suit by falsely and fraudulently promising to pay him the notes as soon as he defeated Ralph Luttrell's suit, he was guilty of fraud in procuring the decree in the injunction suit, and a court of equity should grant relief against the decree so obtained. The bill

therefore stated a good cause of action and the demurrer should have been overruled.

We are of the opinion that the bill also contains a number of allegations pertaining to representations made by Charles E. Wyatt that related to past and existing facts which were false and fraudulent. The representations made by him to the plaintiff in error that his son Ralph Luttrell and Henry L. Child were trying to get his money and were looking for him to arrest him, and that he, Charles E. Wyatt, would accompany plaintiff in error to the depot to protect him from arrest, which Charles E. Wyatt pretended to do, were under the circumstances the grossest kind of misrepresentations of existing facts and aptly fitted to accomplish a fraudulent purpose. The bill discloses many other instances of false statements of existing facts.

The defendant in error, Charles E. Wyatt, further claims that the bill shows John W. Luttrel is guilty of laches and that the demurrer was properly sustained for that reason. The injunction decree was rendered December 22, 1914. This bill to impeach the decree was filed on August 16, 1917. A court of equity applies the doctrine of laches in the denial of relief only where,

from all the circumstances to grant the relief to which a complainant would otherwise be entitled will, presumptively be inequitable and unjust because of the delay. Coryell v. Klehm, 157 Ill. 426 (473). Mere delay

alone, for a period less than that covered by the statute of limitations, is not laches that constitutes a defense. It is only when the delay is accompanied by some other element, rendering it inequitable to permit the owner to assert his title, that laches will bar a right within the statutory period. Compton v. Johnson, 240 Ill. 621 (625). In this case instead of the circumstances showing it inequitable and unjust to grant the relief because of the delay, they, on the contrary, show that it would be highly inequitable and unjust to refuse plaintiff in error the relief prayed. There is no pretense that conditions are any different than they were at the time the decree was entered. The lapse of time has not prejudiced Charles E. Wyatt, but has delayed justice to John W. Luttrell.

The bill avers no facts that justifies a charge of fraud against Henry L. Child. It is regrettable that such a charge is made. The allegations of the bill show that Henry L. Child was doing all in his power to protect his client, and that on account of the false representations of Charles E. Wyatt, John Luttrell refused to counsel with his attorney. This made Henry L. Child a victim of the fraud Charles E. Wyatt practiced upon John W. Luttrell. It would be wrong, for this court, to assume that Henry L. Child would fail to do full duty to secure the correction of the wrong perpetrated upon him and his client by Charles E. Wyatt.

The decree of the circuit court is reversed and this cause remanded with directions to overrule the demurrer.

Reversed and Remanded.

(598a)

GEN. NO. 7029. APRIL TERM, A. D. 1919. AG. N0. 29.

B. L. Kirk, Administrator of the estate of John A. Anderson, deceased, Forest S. Watson, and County of Champaign, in the State of Illinois, Appellees.

vs

214 I.A. 655 4

James L. Gourley, Administrator of the estate of John A. Anderson, deceased, and County of Ford, in the State of Illinois, Appellants.

Appeal from Ford County Circuit Court.

OPINION BY WAGGONER, J.

John A. Anderson died February 18, 1918 in Ford County, Illinois. On the next day, and before the burial of the remains of the decedent, letters of administration were issed on his estate in the County Court of Ford County to James L. Gourley, one of the appellants.

On March 6, 1918, letters of administration were issued on said estate in the County Court of Champaign County to one of the appellees, B. L. Kirk, Public Administrator of that county, on the petition of himself, together with that of the appellee, Forest S. Watson, who claimed to be a creditor of said decedent.

On June 21, 1918, a petition was filed by the appellees, other than Champaign County, in the County Court of Ford County to

set aside, abrogate, annul, cancel and hold for naught all previous orders entered pretending to appoint an administrator for the estate of John A. Anderson deceased, and to strike from the files all papers, petitions, bonds, and other papers filed with the clerk of the County Court of Ford County, in any manner relating to the appointment of said administrator. The County of Champaign filed an intervening petition and was granted leave, by the County Court of Ford County, to join in the petition that had been filed by the other appellees and in such intervening petition it was alleged that the said John A. Anderson was at the time of his death a resident of Champaign County; that he died intestate, without heirs, and that the estate of the decedent escheated to Champaign County. The County of Ford one of the appellants, also filed an intervening petition alleging that the said John A. Anderson was, at the time of his death, a resident of Ford

County and that his estate escheated to that county.

Upon a hearing, in the County Court of Ford County the petitions of the appellees were dismissed. An appeal was taken to the Circuit Court, where a motion to dismiss the petitions of the appellees was denied, and an order entered finding that John A. Anderson, deceased, at the time of his death was a resident and domiciled in Champaign County, Illinois, and that the jurisdiction

of his estate was and is in the County Court of that county. By the judgment of the Circuit Court the order of the County Court appointing James L. Gourley administrator of said estate, and all subsequent orders were set aside, vacated and declared wholly void and of no force or effect, and that the appointment of the said James L. Gourley, as administrator of the estate of John A. Anderson, deceased, by the County Court of Ford County was without jurisdiction.

Valid letters of administration on the estate of John A. Anderson, deceased, could not be obtained in Ford County unless that was his place of residence at the time of his death. The finding of the Circuit Court that he was a resident of Champaign (and not of Ford) County, at such time, is abundantly supported by the evidence, and the judgment rendered on such finding is affirmed. Judgment Affirmed.

(599a)

GEN. NO. 7032 APRIL TERM, A. D. 1919 AG. NO. 32

Ira F. Twist, John F. Twist, and Clarence C. Twist, partners doing business as Twist Brothers, Appellees

vs

Francis M. Burns, Appellant 214 I.A. 655

Appeal from Circuit Court of Christian County.

OPINION BY WAGGONER, J.

This is an appeal from a judgment rendered in the circuit court of Christian County in favor of appellees for one thousand seven hundred and fifty dollars. The declaration consisted of the common counts to which was filed a plea of the general issue with notice of setoff and recoupment. Appellees had an elevator at Velma, Ill., and bought corn from appellant, a farmer residing in that vicinity. It is agreed that the contract price of the corn involved in this litigation was one dollor and thirty cents a bushel, and that the amount, as claimed by appellant, was from four thousand five hundred to four thousand eight hundred bushels. There is no dispute in regard to the amount of advance payments made, by appellees, on the corn, but appellant denies the right of appellees to have credit for interest thereon. There was no delivery made of the corn. Appellant claims that according to the terms of the contract

of purchase it was to have been delivered by him to appellees at their elevator, by March 1, 1918; that he was ready and offered to deliver the corn at that time, but appellees would not receive it; that he (appellant) afterwards sold the corn and by reason of shrinkage and decline in price sustained a loss which, after allowing appellees credit for all advance payments, amounted to nine hundred and eighty six dollars and sixty-three cents. Appellant claims that appellees owe him the amount of such loss and that he should have had a judgment therefor.

Appellees admit that they purchased appellants corn at the price above named; do not dispute the amount thereof as claimed by appellant, but contend that it was to have been delivered, not by March 1, 1918, but as soon after the purchase was made as appellees could take care of it by means of their elevator, and that they notified appellant they would be ready for the corn in the month of April, and that they asked him for the

corn at later dates and it was not delivered.

It is agreed by counsel, in the argument of this case, that the only disputed question of fact involved was relative to what the contract was in regard to the delivery of the corn, and whose fault it was there was no delivery. If the time of delivery was March 1, appellees are in default. If the corn was to be delivered when it

could be taken care of, by appellees, then appellant is in default. There is evidence supporting the contention of each party. The question of the time of delivery was determined by the verdict of the jury, and the record discloses no sufficient reason why the judgment rendered thereon should be reversed.

Judgment affirmed.

600a

GEN. NO. 7058 APRIL TERM A. D. 1919. AG. NO. 38.

Johannah Speiser, Executrix of the last will and testament of William Speiser, deceased,
Appellee

214 I.A. 656

vs

Cleveland, Cincinnati, Chicage and St. Louis Railway Company, Appellant.

Appeal from the Circuit Court of Christian County.

OPINION BY WAGGONER, J.

This is an appeal prosectued by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company from a judgment of $3000.00 recovered by Johannah Speiser, as executrix of the last will and testament of William Speiser, deceased, in the circuit court of Christian County against the railway company, in a suit brought by her to recover pecuniary damages resulting to the next of kin by reason of the death of William Speiser. The declaration, in different counts, alleges that a train of the railway company was driven towards and over a crossing in the village of Witt at a high and excessive rate of speed; a failure to ring a bell or blow a whistle as required by the statute; and the running of such train, in said village, at a greater rate of speed than ten miles an hour in violation of an ordinance. A plea of general issue was filed.

The railway company has four tracks, running in a northeastern and southwestern direction across Main street in the village of Witt, a place of about three thousand five hundred inhabitants. The street runs north and south. William Speiser lived on Main Street southeast from the railway crossing, and had a farm southwest of the village. At the time of the accident he was going from the farm to his home and in so doing had come northeast, for a quarter of a mile, on a public highway running parallel with said tracks until he had gotten to Main Street at a point twenty-five or thirty feet north from the track used in operating westbound trains. At this point he turned south, went to the railway crossing, where he was killed by a westbound passenger train, that did not stop at Witt, ten hours late and running a little more than sixty miles and hour.

As grounds for a reversal of the judgment is is urged that appellee failed to prove that William Speiser was

in the exercise of due care for his own safety at the time of the accident; that the court erred in admitting in evidence and ordinance and in instructing the jury as to the measure of damages.

There is evidence tending to show that approaching this railway crossing from the north on Main street, the view of a train coming from the northeast on the west bound tracks, would be obstructed by a low line of telegraph poles and telephone poles with crossarms

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on them; also by the railway station located seventeen hundred feet up the tracks, and by a box car used for freight storage, eight feet in height resting upon wooden posts about four feet above the ground.

One witness testified that a person coming to the crossing on Main Street, from the southwest, could not see up the tracks until within ten or twelve feet from the rail, and that back of that distance the view would be entirely obstructed. D. L. Renshaw testified that twenty-five feet from the crossing a view of an approaching train would be obstructed by telegraph poles with crossarms; that the track is raised and the poles are low; that within twenty feet of the turn on Main Street, towards the tracks, a train could not be seen if it was more than one hundred yards from the crossing.

Wilhelmina Valusk testified that she passed over the crossing, walking, just before William Speiser; that she looked when on the first track, could see beyond the station, but saw no train coming; that after she had walked forty or fifty feet from the west track, which required three quarters of a minute, she heard the noise of a train, looked back and saw William Speiser lying between two of the tracks, where he died.

Appellant's station agent testified that the train in question entered the block at Nokomis four and a quarter miles from Witt

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at 9:25 a. m., and four minutes later entered the block at Witt. In other words, the train was running at a rate of more than a mile a minute. If it had been at the station when first seen by William Speiser, in less than nineteen seconds it would have been at the crossing.

As William Speiser approached the crossing he had a right to assume that any passenger train operated by appellant within the corporate limits of the village of

Witt would be run at a rate of speed not to exceed ten miles per hour, as provided by ordinance, and that a warning would be given of the approach of a train by ringing a bell or sounding a whistle. In the case of B. & O. S. W. Ry. C. v. Then, 159 Ill. 537, it is said that, "she (decedent) had a right to rely upon the performance of the duty imposed upon the defendant by the city ordinances, to warn her of the approach of the train by continuously ringing the bell upon the engine, and not to run said train faster than ten miles an hour within the city, and there was evidence tending strongly to show this duty was not performed. Among other things proper for the jury to consider in determing this question of due care is the instinct prompting to preservation of life and avoidance of danger. (Illinois Central Railroad v. Nowicky, 148 Ill. 29; Terre Haute & Indianapolis Railroad Co. v. Volker, 129 Ill. 540).

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In our judgment the evidence justified the jury in finding deceased exercised reasonable care at the time in question." To the same effect is the holding of the court in Henry v. C. C. C. & St. Louis Ry Co. 236 Ill. 219 (222); Dukeman v. C. C. C. & St. Louis Ry. Co. 237 Ill. 104 (107).

The evidence is conflicting in reference to whether the bell was rung or the whistle sounded. There is no contention, however, that the speed of the train was within the limit fixed by the ordinance of the village of Witt, but on the contrary the contention is that the ordinance is unreasonable, void, a burden upon interstate commerce, and that appellant had a right to operate the train without any reference to the provision thereof

The City of Carlinville, Illinois, with a population of three thousand six hundred inhabitants, adopted an ordinance with the same provision as the one in question. Suit was brought and a recovery had against the Chicago & Alton Railroad Company for a violation of it. The validity of the ordinance was challenged upon the grounds that it was an unreasonable restriction upon interstate commerce, and an unnecessary hindrance to the speedy carrying of the United States mail. In passing upon the validty of the ordinance. (C. & A. R. R. Co. v. City of Carlinville, 200 Ill. 225), the court said,

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"taking into consideration the existing circumstances and conditions,

the necessity for its adoption, the object sought to be accomplished, and the effect upon the business of the appellant, we are unable to say the ordinance is unreasonable, but are of the opinion that it is a valid exercise of the police power of the city. The next question which presents itself for consideration is, does the ordinance in question impose an unreasonable restriction upon interstate commerce and the speedy transportation of the United States mail? We are of the opinion it does not. The ordinance was passed as a police regulation for the preservation of the safety of the public and the protection of life and property, and was no more than a fair exercise of the police power vested in the city. (Toledo, Peoria & Warsaw Railway Co. v. Detcon, 63 Ill. 91; Chicago, Burlington & Quincy Railroad Co. v. Haggerty, 67 Ill. 113). The ordinance does not undertake to regulate commerce between the States or interfere with the transportation of the mail, and amounts to but a reasonable regulation of the speed of trains within the corporate limits of the city, and such legislation has uniformly been held to be valid." What is said in this case is decisive of the question of the validity of the ordinance in the case at bar. The ordinance is valid and was properly admitted in evidence.

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It is said that the trial court erred in giving the first, second and fourth instructions asked by appellee. In each of these instructions the jury were told that, if they found the defendant guilty, they should assess the plaintiff's damages at whatever sum the widow sustained by reason of the death of her husband. It is said that these instructions do not limit the recovery to pecuniary injury, but leave to the jury the option to fix such sum, as in their judgment, will compensate her not only for the pecuniary loss, but any loss the jury may have thought she sustained by the death. If these instructions were the only ones given upon the subject of damages, then they would be justly subject to criticism. The jury were also instructed that if they found for the plaintiff, they could not under the law, include in their verdict anything on account of the bereavement of the family of the deceased, nor for the loss of his presence or companionship, nor on account of grief, sorrow or wounded feelings, but for the death of William Speiser they should only alow such pecuniary or money loss as the widow is shown by a preponderance of the evidence to have

sustained by reason of such death. This last instruction was given on the request of appellant, and supplies the ommission in the three instructions complained of. Ommissions in the plaintiff's instructions may be cured by those given

on behalf of the defendant. Moore v. Aurora, Elgin and Chicago Ry. Co. 246 Ill. 56 (60). Several instructions were given in reference to ordinary care an dit was not reversible error to refuse two additional ones.

After a careful examination of the record, we find no reason for reversing the judgment, and the same will be affirmed.

Affirmed.

Rhg denied June 6, 1919

(6 B/a)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton
(appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit, On the twelth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

214 I.A. 656

M. Sternberger,
Appellee

vs.

No. 8
October Term, 1918.

Clemouth January, etc.,
Appellant

~~ERROR TO~~
APPEAL FROM

City COURT

East St. Louis ~~COUNTY~~

TRIAL JUDGE

HON. H. I. BROWNING

Term No. 8. In the Appellate Court Agenda No.18

of Illinois, Fourth District.

October Term, A. D. 1918.

M. Sternberger, Appellee vs. Clemouth January, Metropolitan Life Insurance Company, Garnishee, Appellant	Appeal from the City Court of East St. Louis.

Opinion by Boggs, J.

This appeal is prosecuted by appellants to reverse a judgment for $179.50 rendered by the City Court of East St. Louis against appellant Clemouth January, judgment debtor and against the Metropolitan Life Insurance Company, garnishee, for use, etc. Appellants failed to file an abstract of the record in this case. It did, however, file an index to the record which it designates as an abstract. This index occupies less than one full page. No part of the proceedings as set forth in the record have been abstracted and under the holding of the Supreme Court and Appellate Courts of this State, failure so to file an abstract is ground for a dismissal of the appeal or for affirming the judgment of the lower court. Lareal v. The Town of Whitehall, 2 Ill.App.509; Town of Santa Anna v. Tipton et al, 10 App.310; Lancaster v. The S. & E. W. Ry. Co. 132 Ill.492; Cahill v. Trinty, 138 Ill.App.605; Ferguson v. Adams Mfg.Co. 66 Ill.App.164; Smith vs. Tenny 60 Ill. App. 442.

In Isreal v. Town of Whitehall, supra. at page 510, the Court says: "We also find on file a brief of appellant in which he insists that the judgment should be reversed because it is against the evidence and because the Court gave and refused divers instructions which he says are contained in the record, but neither the evidence nor instructions are copied into his abstract or brief. The court, however, is referred to the page of the original record for them. This, in our opinion, is such a failure to comply with the rules of the court as to make it the duty of the court to affirm the judgment below for want of an abstract. If this practice is to prevail in this case, it must be allowed in all other similar cases, and the rules will be evaded and their object wholly defeated."

In Town of Santa Anna vs. Tipton, et al. supra. at page 311 the court says: "We do not feel under any obligations to examine a case of this magnitude without a proper abstract, and for this reason we affirm the judgment of the circuit court. (Citing) Isreal v. Town of Whitehall, 2 Bradwell, 509; Buckley v. Eaton, 60 Ill.252; Bellcher v. Tisdale, 23 Ill.425; Johnson v. Bantock, 38 Ill. 111."

In the case of Ferguson v. Chas. F. Adams Mfg. Co. supra. at page 154 the court says: "Appellant has filed what purports to be an abstract of the record. It amounts to nothing more than a mere index to the record. Rule 28 of this court requires the appellant to furnish a complete abstract of the record in which shall appear the evidence in narrative form. There is not one word of evidence in what purports to be the abstract here. The motion which appellee makes to affirm the judgment for want of sufficient abstract must prevail."

In Lancaster v. N. & N. W. Ry.Co. supra. the court at page 493 says: "Not only has this court inherent power to institute and prescribe rules of practice, but such power is expressly conferred by statute. R. S. 1874, Chap.37, Sec. 12. Such rules when established have the force of law and are obligatory upon the court itself, as well as upon the parties to causes pending before it. While the court may at any time modify or even rescind its rules, yet until it does so, it should administer them according to their terms, and it can have no discretion to apply them or not, according to its convenience, unless such discretion is reserved in the rules themselves. Owens v. Longstead, 22 Ill. 161; I.C.R.R.Co. Haskins, 115 Ill.300; Beveridge v. Hewitt, 8 Ill.App.467."

Inasmuch as appellants have made no attempt to file an abstract in this case but have entirely omitted to do so for this court to overlook the plain provisions of its rules requiring the filing of an abstract of the record sought to be reviewed would in effect be to set aside and hold the rule to be of no force and effect and this we are not inclined to do.

For the failure to file an abstract of the record in this case in compliance with the rules of this court the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th *day of* July *A. D. 191*7.

Clerk of the Appellate Court

NOINI

(602 i)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Andrew Letz,
Appellee

No. 6
MARCH TERM. 1919.

vs.

Kolb Coal Company,
Appellant

214 I.A. 656

ERROR TO
APPEAL FROM

Circuit **COURT**

St. Clair **COUNTY**

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 6. Agenda No. 1

March Term, A. D. 1919.

Andrew Letz, Appellee v. Kolb Coal Company Appellant	Appeal from St. Clair.

Opinion by Higbee, P.J.

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Andrew Letz, appellee, started suit in the circuit court of St. Clair county against the Kolb Coal Company, appellant, to recover damages for personal injuries received in its mine.

The case was first tried with a jury which found the issues for appellee and assessed his damages at $6000. That case being brought to this court on appeal was reversed and remanded. Letz v. Kolb Coal Co., 206 Ill.App.200. On the second trial a jury was waived and the court found the issues for appellee assessing his damages at $6000. Appellant submitted six propositions of law, all but the first of which the court refused and again brought the case to this court on appeal, assigning numerous errors. The pleadings were the same as on the first trial. Appellee presented his case by reading into the record the evidence he produced at the former trial, omitting the testimony of the witness, William Hartman, and calling one new witness, Thomas Simpson, county mine inspector of St.Clair county. Whether appellant presented its case by reading into the record the evidence produced at the former trial, or by

Term No. 6. Appeals No. 1

Entered Term, 6. 1. 1916.

Before Tate,

Appellant

v.

Appeal from Sh. Court.

Bois Coal Company

Respondent.

Opinion of Judge, T.J.

Review Data, appellee, started suit in the district court of Mr. Clair county against the Bois Coal Company, respondent, to recover damages for personal injuries received in the mine.

The case was first tried with a jury which found the issues for appellee and assessed his damages at $[illegible]. That case being brought to this court on appeal was reversed and remanded, Bois v. Bois Coal Co., [illegible] 101. On the second trial a jury was waived and the court tried the issues for appellee assessing his damages at $[illegible]. Respondent moved in arrest and for judgment in its favor, on the ground that the court without any legal authority to do so, in this court on appeal, substituted another jury for the one by law. The plaintiff was not the same as in the first trial. Appellee filed motion to strike the record and evidence in support of the trial court, holding the testimony of the witness, William Stephens, and excluding the witness, Thomas Simpson, upon the ground of incompetency. Counsel appellant presented its case by reading into the record the evidence introduced at the former trial, or by

having the witnesses testify, is not clear. It is admitted by both parties that there is little change in the evidence but appellee contends that his evidence is more full and conclusive on doubtful issues. That claim must be based upon the additional testimony of the witness Simpson and not upon any change in appellee's evidence, as none is pointed out or appears to us.

The testimony of the witness Simpson does not change the facts and the case comes to this court on the same facts as on the former hearing. We do not deem it necessary to here state appellant's second, third, fourth, fifth and sixth propositions of law as they followed the opinion of this court and it was error to refuse them. The facts being the same as when the case was before this court on the former hearing, we are again compelled to find that the judgment of the circuit court was manifestly against the weight of the evidence.

We do not deem it necessary to discuss the able arguments or the numerous authorities cited in the briefs, because appellee has not presented any argument or cited any authority that convinces us the former opinion of this court does not present the law governing this case.

For the reasons above given the judgment is reversed and we find as facts that appellant complied with the requirements of the Mines and Miners' Act; that appellee was told by the mine manager of appellant to remove the clod from over the place where he was injured; that appellee disregarded that instruction and began to mine coal in which work he was engaged at the time he was injured and that appellee assumed the risk which caused his injury.

Reversed with finding of facts.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*7.

Clerk of the Appellate Court

NOINI

(6039)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

214 I.A. 656 4

Charles Stewart, Admr. of the estate of Oscar H. Mooneyham, deceased, Defendant in Error

No. 23

MARCH TERM. 1919.

vs.

Thomas D. Reed, Receiver of the C. & E. I. R. R. Co. etc., Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

TermNo. 23. In the Appellate Court, Agenda No.34

Fourth District.

March Term, A. D. 1919.

Charles A. Stewart, Admr. of the estate of Oscar R. Mooneyham, Deceased, Defendant in Error.	
vs.	Error to the Circuit Court of Franklin County.
Thomas D. Reed, Receiver of the Chicago & Eastern Illinois Railroad Company, etc., Plaintiff in Error.	

Opinion by Higbee, P. J.

---oOo---

Charles A. Stewart, as administrator of the estate of Oscar R. Mooneyham, deceased, brought this suit against Thomas D. Reed, Receiver of the Chicago & Eastern Illinois Railroad Company, to recover damages for the death of his intestate, alleged to have been caused on September 8, 1915 by the negligence of said Receiver.

It appeared from the proofs that on said date the said Oscar R. Mooneyham was driving a Maxwell automobile owned by him along the highway between West Frankfort and Johnson City, Illinois. With him in the automobile at that time were Albert R. Brown, Senior, his son, Albert R. Brown, Jr., then slightly over 5 years of age, a man named Dixon and another named McDonald. Some two and a half miles south of said City of West Frankfort the automobile collided with a passenger train on the C. & E. I. R. R.Co., and as a result of the collision the car was demolished and all the occupants of the same, except Mr. Dixon, were killed. Suit was brought by Frank Easley, Administrator of the estate of Albert R. Brown, Jr., deceased, against said Receiver, and a judgment

Terms. 22. In the Appellate Court. Appeal 5s.,24

Fourth District.

Spring Term, A. D. 1919.

Charles L. Stewart, Adm. of the estate of Henry H. Stewart, Deceased, Appellant. Defendant in Error.	Error to the Circuit Court of Franklin County.
vs.	
Thomas C. Dyer, Receiver of the Chicago & Eastern Illinois Railroad Company, etc.. Plaintiff in Error.	

Opinion by Taylor, P. J.

Charles L. Stewart, as administrator of the estate of Henry H. Stewart, Deceased, brought this suit against Thomas C. Dyer, Receiver of the Chicago & Eastern Illinois Railroad Company, to recover damages for the death of his intestate, alleged to have been caused by negligence, and by the negligence of said Receiver.

It appeared from the pleadings that on the date the said Henry H. Stewart, accompanied by a number of companions, was driving a horse and buggy in the direction of Benton, Illinois. While he was in the automobile at some place near Alpha C. Dyer, Junior, his son, Alpha C. Dyer, Jr., upon alighting upon a flight of steps, a gun owned him and another armed therewith. Upon the end a ball which struck and killed Henry H. Stewart the automobile collided with a passenger train on the C. & E. I. R. R., and in a result of the collision the car was demolished and all the occupants of the car, except Mr. Stewart, were killed. Mr. Dyer was thrown by the force, Jacob Dr., Junior, administrator of the estate of Alpha C. Dyer, Jr., deceased, started suit against, and a judgment

obtained in the Circuit Court of Franklin County in favor of said administrator, which the defendant below brought to this court for review by writ of error.

Upon the hearing we reversed that judgment and found as ultimate facts in the case that plaintiff in error, the Receiver, was not guilty of the negligence charged in the declaration; that Albert H. Brown, Sr., who was father of defendant in error's intestate, an infant under six years of age, was not in the exercise of due care for the safety of his infant son, for whose death the suit was brought, and that his negligence contributed directly to the injury and death of his son.

We refer to the opinion filed in that case on November 1, 1918 for a full statement of the facts, and our reasons for reversing the judgment of the Circuit Court therein.

The declaration in this case in six counts charges negligence on the part of plaintiff in error in failing to ring the bell of its engine and blowing the whistle in approaching the crossing where the collision occurred, in running the train at an excessive rate of speed, general negligence in the management of the train, a failure to keep the right of way near said crossing free from grass, weeds, brush and other obstructions so that persons approaching said crossing might, before going upon same, be able to see said train. It is claimed by plaintiff in error that the facts in this case are the same as in the suit brought to recover for the death of Albert H. Brown, Jr., while defendant in error insists that the facts are not exactly the same and that the evidence here clearly shows negligence on the part of employees of plaintiff in error in handling the train, which caused the death of Mr. Mooneyham, and in allowing a

growth of weeds and bushes along the right of way, which obstructed the view to one approaching the crossing.

Upon an examination of the case, however, we find no substantial difference in the proof, and we must therefore arrive at the same conclusion that we reached in the former case. That portion of such opinion which refers to the negligence charged to Albert E. Brown, Sr., the father of the child on account of the death of whom the suit was brought, would seem to apply with even greater force in this case to Mr. Mooneyham who was the owner and driver of the car at the time the injuries occurred.

For the reasons stated in our former opinion, above referred to, the judgment in this case will be reversed and we find as the ultimate facts in the case that plaintiff in error was not guilty of the negligence charged in the declaration; that Oscar L. Mooneyham, defendant in error's intestate, was not in the exercise of due care for his own safety at the time of the injury complained of and that his negligence contributed directly to cause his injury and subsequent death.

REVERSED WITH FINDING OF FACT.

Not to be reported in full.

Eagleton, J. took no part in the hearing of this cause.

[illegible] of weeds and bushes along the right of way, which obstructed the view in the approaching the crossing.

Upon an examination of the area, however, we find no substantial difference in the sound, and we must therefore arrive at the same conclusion that we reached in the former case, that getting of such opinion would relate to the negligence charged in Count 1., Count, 2., the failure of the child to account of the death of whom the suit was brought, could have to amply which even greater force in this case is 2., Accordingly the was the sound and living of the car at the line the injuries received.

For the reasons stated in our former opinion, more related to, the judgment in this case will be reversed and we find as the ultimate fact in the case that plaintiff in error was not guilty of the negligence charged in the declaration; that there is, therefore, substantial in error's contention, and not in the evidence of the area for his was hurtly at the time of the injury complained of and that the negligence contributed directly to cause the injury and is therefore fatal.

Judgment are therefore.

Not to be reported in full.

Judgment, it has no part in the hearing of this cause.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*9.

C. C. Johnson

Clerk of the Appellate Court

NOINI

(604a)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Anna B. Carroll,
Appellee

No. 7
MARCH TERM. 1919.

vs.

John P. Glynn,
Appellant

214 I.A. 657

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Alexander COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

No. 7. In the Appellate Court Agenda No.2

of Illinois, Fourth District

March Term A. D. 1919.

Anna B. Carroll, Appellee,	)	
vs.	)	Appeal from the Circuit Court
John F. Glynn, Appellant	)	Alexander County.

Opinion by Boggs, J.

This is an appeal from a judgment of $308.58 rendered by the Circuit Court of Alexander County in favor of Appellee in an action in trover brought to recover the value of a certain piano, alleged to have been converted by Appellant. The abstract in this case does not comply with the rules of this Court in that it fails to abstract the pleadings or the judgment, but inasmuch as Appellee has filed a brief and as there is no question raised by the parties on the pleadings we have considered the case on the merits. Litigants, however, should observe the rules of the Court with reference to the filing of proper abstracts. A failure so to do would warrant the Court in affirming a judgment pro forma. Bishop v. Loewus 63 App.351; Elia v. Societa Mutuo Soccorso Di Piane Crati, 203 App.278.

The principal ground urged by Appellant for a reversal of the judgment in this case is, that the verdict of the jury is against themanifest weight of the evidence.

The evidence tends to prove that Appellant who was engaged in the business of draying received the piano in question from Olive Virginia Carroll, daughter of Appellee and was requested by her to remove the same from the dwelling

No. 7. In the Appellate Court Appeals No.2
of Illinois, Fourth District
March Term A. D. 1916.

Anna E. Carroll, Appellee, vs. John I. Clyde, Appellant	Appeal from the Circuit Court Carroll County.

Opinion of Boggs, J.

This is an appeal from a judgment of $200.00 rendered by the Circuit Court of Carroll County in favor of Appellee in an action in trover brought to recover the value of a certain piano, alleged to have been converted by Appellant. The abstract in this case has not complied with the rules of this court in that it fails to abstract the pleadings or the judgment, but inasmuch as Appellee has filed a brief and no there is no question raised by the parties on the pleadings we have considered the case on the merits.

Without, however, should survive the rules of the Court with reference to the filing of proper abstracts. A failure so to do would warrant the Court in affirming a judgment pro forma. Kirby v. Larson 64 App.581; Hale v. Chapman Dates Company 32 Ill.App. 1911, 207 App.-Ill.

The principal ground urged by Appellant for a reversal of the judgment in this case is, that the verdict of the jury is against the manifest weight of the evidence.

The evidence tends to prove that Appellant who was engaged in the business of dyeing pianos the place in question from Dixie Virginia Carroll, daughter of Appellee and was accompanied by her in leaving the home from the dwelling

in which she and her mother, (Appellee herein), were residing, to the ware house of Appellant. After having received instructions from the daughter with reference to the moving of said piano, Appellant received a communication from Appellee with reference thereto. After Appellant had removed said piano to his ware house Appellee made a demand on him for the same and Appellant having refused to deliver the piano to her this action in trover was brought.

The evidence on the part of Appellant further tends to show that this piano was purchased some years prior to the litigation here in question by William Carroll, husband of Appellee and father of the said Olive Virginia Carroll, he paying $150. down on said piano and gave a chattel mortgage for $350. to secure the balance of said purchase price; that said piano was purchased for and given by said William Carroll to his daughters Olive Virginia Carroll and Lucile Porter. Said daughters at the time said piano was purchased were quite young and unmarried but have since married. On the other hand Appellee contended and her evidence tends to prove that the piano in question was purchased by her and while the original payment may have been made by her husband, William Carroll, that the piano was hers and that the deferred payment was paid by her in installments. Appellee offered certain receipts some ten in number in evidence from the piano company to herself showing such payments.

Appellees evidence further tends to show that on the day Appellant hauled this piano from the residence where she and her daughter were then living, she gave an order to Appellant to call for the piano and that she delivered the piano to Appellant and instructed him to haul the piano from there to another residence in which she was going to move, and that Appellant received the paino but failed to deliver it

according to her instructions.

The evidence on the part of Appellee tends to prove that when she called up, Appellant, and inquired as to why the piano had not been delivered that he said to her that he did not know anything about it and did not care anything about it. To an Officer who made demand on Appellant for the piano he stated he did not have it.

While the evidence in the record is conflicting the evidence is sufficient to support the verdict of the jury finding the issues for Appellee, and we are not disposed to disturb the same.

It is complained by Appellant that the Court erred in its rulings on the evidence. The most serious complaint made is that the Court permitted articles of separation signed by Appellee and her said husband William Carroll to be given in evidence on the part of Appellee and which said articles recited that the parties had agreed to live separate and apart and that the husband of Appellee had agreed therein that all the household goods and furniture either owned by appellee or in her possession and control should not be interfered with by him and further provided, "she shall and may enjoy and absolutely dispose of the same as if she were a femme sole and unmarried." We do not think the Court erred in admitting this instrument in evidence for the same tends to show that as between Appellee and her husband, Appellee was the owner of or had the rightful control and right to dispose of the piano in question.

It is also insisted that the Court erred, in refusing to admit in evidence on the part of Appellant a Chattel Mortgage given by William Carroll husband of Appellee to secure the balance of the purchase money owing on the piano in question. We are of the opinion that the Court should have

admitted said instrument, but we do not think the failure to admit the same was reversible error for at most it was only a circumstance tending to show that William Carroll purchased the piano; it does not however, tend to show that he gave it to his daughters and if purchased by William Carroll and not so given to his daughters, it would have passed to Appellee under the separation contract.

It is next insisted by Appellant that the Court erred in its rulings on the instructions. It is contended that the Court erred in giving instructions numbered three, six, seven, eight, nine and ten on the part of Appellee and in refusing to give instructions number six, seven and twelve offered by Appellant.

We have examined these instructions and do not believe that the Court committed any serious error in its rulings on the same. Ten instructions were given on behalf of Appellant and these instructions fully advised the jury with reference to the theory on which Appellant was defending this case. The instructions given on behalf of Appellee, while they may not have been as carefully drawn and guarded as should be, at the same time we find no serious error in the giving of these instructions.

Lastly it is contended by Appellant that the verdict is excessive. The piano in question cost $500. but was some eight or ten years old, but the evidence tended to show it was well preserved at the time the same was delivered to Appellant, and while we think the verdict is rather large, we are not ready to say that the finding of the jury in their verdict is so excessive as to warrant us in reversing the case on that ground.

Finding no reversible error in the record, the judgment of the trial Court will be affirmed.

Affirmed.

Not to be reported in full.

admitted this instrument. But we do not think the failure to admit the note was material error for it does not appear that a substantial doubling in size that would probably produced the result if had not intervened, even if we were able to give it to his conclusion and it produced by filling forward and not so given to his daughter, it might have caused to dispute under the admission evidence.

It is not indeed by disputed that the court erred in its ruling in the instructions. It is contended that the Court erred in giving instructions numbered three, six, seven, eight, nine and ten on the part of defendant and in refusing to give instructions number six, seven and twelve offered by plaintiff.

We have examined these instructions and do not believe that the court committed any reversible error in its ruling on the same. The instructions were given and refused in the form of questions and answer instructions fully covered the law relative to the liability on which defendant was entitled to have the jury instructed on this issue. The instructions given on behalf of defendant, while they may not have been as verbally fluent and powerful as would be, at the most have no tend to prejudice error in the ruling of those instructions.

Lastly it is contended by plaintiff that the verdict is excessive. The proof is meagre and lacking, but was some light of the proper kind, but the evidence tended to show it was well preserved at the time the note was delivered to defendant, and while we think the verdict is rather large, we are not ready to say that the finding of the jury in such regard is so excessive as to warrant us in reversing the case on that ground.

Finding no reversible error in the record, the judgment of the trial Court will be affirmed.

Let it be reported in full.

-4-

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*9.

C. C. Johnson

Clerk of the Appellate Court

NOINI

(6056)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

214 I.A. 657

Max Pichinson,
Appellant

No. 14
MARCH TERM, 1919.

vs.

Julia Truckey,
Appellee

~~ERROR TO~~
APPEAL FROM

City COURT

East St. Louis ~~COUNTY~~

TRIAL JUDGE

HON. H. L. BROWNING

Term No. 14. In the Appellate Court Agenda No.8.

of Illinois, Fourth District.

March Term A. D. 1919.

Max Pichinson, Appellant vs. Julia Truckey, Appellee	Appeal from City Court East St. Louis, Ill.

Opinion by Boggs, J.

Appellant filed a writ of attachment in a Justice of the Peace Court of East St. Louis, Illinois, attaching goods of appellee, for an alleged indebtedness of $42.55 for groceries sold by appellant to appellee. Upon a trial by jury a verdict was rendered in favor of appellee and an appeal was perfected by appellant to the City Court of East St. Louis. The jury in the City Court found the issues both as to the debt and attachment in favor of appellee. A motion for a new trial was overruled and judgment was entered on the verdict. To reverse said judgment this appeal is prosecuted.

It is contended by appellant that the verdict is against the manifest weight of the evidence and that the judgment should therefore be set aside. The evidence, while not voluminous, is conflicting. Appellant testified that appellee had purchased the goods in question and had not paid for them. Appellant produced a witness who testified that appellee had said in her hearing that she, appellee, owed the account, but intended to beat the same. On the other hand appellee testified that she had traded with appellant

Term No. 19. In the Supreme Court. Appeals No. 8.
of Illinois, Fourth District.
Spring Term A. D. 1922.

Ben Sirotzkey, Appellant, vs. Julia Trowsky, Appellee	Appeal from City Court of East St. Louis, Ill.

Opinion by Mogan, J.

Appellant filed a writ of attachment in a Justice of the Peace Court of East St. Louis, Illinois, attaching goods of appellee, for an alleged indebtedness of $82.00 for groceries sold by appellant to appellee. Then a trial by jury a verdict was rendered in favor of appellee and an appeal was prosecuted by appellant to the City Court of East St. Louis. The jury in the City Court found the issues joined in the debt and attachment in favor of appellee. A motion for a new trial was overruled and judgment was entered on the verdict. To reverse said judgment this appeal is prosecuted.

It is contended by appellant that the verdict is against the manifest weight of the evidence and that the judgment should therefore be set aside. The attorney, while not admitting, is conceding. Appellant testified that appellee had purchased the goods in question and had not paid for them. Appellant produced a witness who testified that according that said in the hearing that its, counsel, and the account, but intended to test the case. On the other hand appellee testified that she had traded with appellant

but had paid him in full more than a year prior to the commencement of the suit and produced a witness who testified that he had heard appellant say that appellee owed him nothing and that she had paid her account. Two juries have heard the evidence in this case and have found the issues on each occasion in favor of appellee. We cannot, on the evidence in the record, say the verdict is against the manifest weight of the evidence and unless we can do so, we would not be justified in setting aside the verdict on that ground alone, especially where two trials have resulted in the same way. Hill v. Mahrns, 158 Ill.314; Sullivan v. Bolling,13 Ill.85; Bloom v. Crane, 24 Ill.49; Bloomer v.Benman,12 Ill.240; Goodell v. Woodruff,20Ill.192; Chicago and Rock Island Railroad Co.v.Hutchins, 34 Ill.108; O'Brien v.Palmer,49 Ill.72; Howitt v.Estelle,92 Ill.218; Lightlinger v.Hagen,75 Ill.141; Greene v.Greene,145 Ill.264; McCommon v.McCommon,151 Ill.428.

It is also contended by appellant that the jury who last tried this case were tampered with. Appellant contends that the attorney for appellee, employed a junk dealer by the name of Cohn, to fix the jury, and that the latter had openly boasted that the jurors did just what they promised to do and that he knew the jurors would not fail him. This is a very serious charge and should be dealt with accordingly. In Vane et al vs. City of Evanston, 150 Ill.616, our Supreme Court in passing upon a similar question,said:"Tampering with juries by the successful party litigant, or doing any act out of the presence of the Court which would have a tendency to bias or prejudice them in the consideration of the cause, will ordinarily afford sufficient ground for granting a new trial. No right is more valuable to the citizen, or more important in the due and orderly administration of justice,

than that jurors should be kept absolutely free from anything that might improperly influence their deliberations." To the same effect is Sebree v. Board of Education, 254 Ill.453.

In the case before us, the issues had been tried and a verdict returned for appellee and appellant entered his motion for a new trial. Thereafter appellant asked leave to file an amended motion for a new trial, supported by affidavit of appellant setting out the alleged facts relating to tampering with the jury. In his affidavit appellant stated that such information had lately come to his knowleage, and that the motion was not made for delay, but to assist the court in preventing a miscarriage of justice. The affidavit does not allege facts showing any attempt to procure such affidavits or appellant's inability to do so for want of sufficient time.

Questions of this character are largely in the discretion of the trial court, and we are not prepared to say the court abused its discretion in refusing to continue said motion for a new trial awaiting an effort on the part of appellant to obtain affidavits to support his motion. Especially, as the motion for a new trial had already been pending several months.

There were no pleadings in this case and no instrue tions were submitted to the jury and no complaint is made on the ruling of the court on the admission of evidence, so there are no questions of law involved, but only questions of fact, which have been passed on by the jury. We are not disposed to disturb their finding.

The judgment of the trial court is therefore affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*7.

C. C. Johnson

Clerk of the Appellate Court

NOINI

6062

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

214 I.A. 657 3

Zeno Striei,
Appellee

No. 16
MARCH TERM, 1919.

vs.

~~Fred H. Johantosettel,~~
~~Appellant~~

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 16. In the Appellate Court Agenda No.29

of Illinois, Fourth District.

March Term, A. D. 1919.

Leno Strief, Appellee	)	
vs.	)	Appeal from the Circuit Court of Madison County, Illinois.
Fred M. Johantgesettel, Appellant	)	

Mr Boggs, J.

Appellee filed in the Circuit Court of Madison County at the March term 1918, a bill to set aside a certain sale of stock made by appellant to appellee in the corporation known as Highland Marble Works.

Said bill alleges that on the 24th day of December 1918, appellant proposed to sell to appellee ten shares of stock in said corporation for the sum of $1000.00 being the par value thereof. That in order to induce appellee to purchase said stock appellant falsely and fraudulently represented "that the business of said corporation was in a flourishing and prosperous condition and that its assets were more than equal in value to the amount of its capital stock after deducting there from all outstanding liabilities of whatsoever nature; that such outstanding liabilities of said corporation of all kinds did not exceed the sum of $1900.00; that the affairs and business of said corporation were such that the said corporation could and would from its earning shortly declare a dividend upon such stock."

The bill further alleges that the indebtedness owing by said corporation amounted to the sum of $4500. and that 25% of the assets of said corporation was made up of notes and accounts of doubtful or no value, and that the capital stock was impaired at least fifty per cent. The bill

Term No. 30. In the Appellate Court Appeals No.25
of Illinois, Fourth District.
March Term, A. D. 1919.

Leon Carter, Appellee	
vs.	Appeal from the Circuit Court of Madison County, Illinois.
Fred T. Ackerman, Appellant	

Mr Justice, P.

Appellee filed in the Circuit Court of Madison County at the March term 1919, a bill to set aside a conveyance made by appellant to appellee by the corporation known as Wigginsville Lands Corp.

Said bill alleges that on the 24th day of December 1914, appellant proposed to sell to appellee ten shares of stock in said corporation for the sum of $1000.00 being the par value thereof. That in order to induce appellee to purchase said stock appellant falsely and fraudulently represented that the business of said corporation was in a flourishing and prosperous condition and that its assets were more than equal in value to the amount of its capital stock after deducting there from all outstanding liabilities of whatsoever nature; that such misleading statements of said corporation at all times did not exceed the sum of $1800.00; that the affairs and business of said corporation were such that the said corporation could and would from its earnings monthly declare a dividend upon said stock."

The bill further alleges that the representations by said corporation amounted to the sum of $800. and that 50% of the assets of said corporation was made up of notes and accounts of doubtful or no value, and that the capital stock was impaired at least fifty per cent. The bill

further alleges the payment of $1000. for said stock and that on becoming advised of the true condition of the business of said corporation and the fact that it was indebted to the sum of $4500. instead of $1900. he tendered to appellant said shares of stock and demanded a return of the money paid by him therefor. Said bill also alleges the bringing in of said stock into court and the keeping good of the tender and prays that said contract be declared null and void and that an accounting be had on the recision of said contract.

Appellant filed an answer to said bill admitting the sale of said stock but denying the averments with reference to representations alleged to have been made by him to appellee to induce appellee to purchase said stock; also denying that the capital stock of said corporation was impaired to the extent of fifty per cent and denying that of the assets of said corporation twenty-five per cent were made up of outstanding notes and accounts of doubtful or no value, also denying that appellee ever tendered a return of the stock and denying all charges of fraud and misrepresentation.

A replication being filed to said answer the cause was referred to the Master in Chancery who made a report finding the equities of the cause to be with appellee and recommending a decree setting aside said sale and recommending that appellee have a decree for the amount paid by him for said stock, together with interest accrued thereon.

The master in his said report found among other things that appellant had represented to appellee, in order to bring about a sale of said stock, that the outstanding indebtedness owing by said corporation was $1900. and that as a matter of fact that the indebtedness at said time was in excess of $4200. The master also found that appellant had

stated to appellee that said stock would pay a dividend of at least five per cent the latter part of December 1912 and that that would be coming to appellee; he also found that the capital stock of said corporation was impaired twenty-five per cent on account of uncollectible assets.

Exceptions were filed to the report of said master which exceptions were overruled and a degree was entered by the court finding the equities of the cause to be with appellee and finding that appellant had made fraudulent representations as above set forth in order to induce the sale of said stock and finding that appellee on discovering that said representations so made by appellant were false and fraudulent tendered a return of said stock and demanded the repayment of his money to him. The court decreed that said sale be rescinded, set aside and held for naught and that appellee recover from appellant the sum of $1285.00, together with interest thereon from March 5, 1913, the date of the filing of the bill. To reverse said decree this appeal is prosecuted.

It is first urged by appellant for a reversal of said decree that appellee has an adequate remedy at law and that equity has no jurisdiction of the subject matter of this proceeding. A demurrer was filed by appellant to the bill of complaint filed by appellee which demurrer was overruled and appellant having answered said bill without in any manner raising the question of the jurisdiction of the court to hear and determine the matters involved in said bill is not in a position at this time to raise said question, as courts of equity have jurisdiction of controversies of this character. Objections to the effect that a party filing a bill in equity has an adequate remedy at law must be made in apt time to be available. Black v. Miller 173 Ill.489; Law v. Ware, 238 Ill.360.

In Law v. Ware, supra. the court at page 363 discussing this question says: "It is first contended that the Superior Court erred in granting any relief, for the reason that the complainant had a complete remedy at law. The defendant did not demur to the bill, but at the conclusion of his answer prayed the same right and advantageof the answer as if he had especially pleaded or demurred to the bill. If the subject matter of a bill of complaint is wholly foreign to the jurisdiction of a court of chancery, such as a claim of damages for slander, assault and batter or personal injury, the court is incompetent to grant the relief sought for, and it will be denied although the defendant has submitted himself to the jurisdiction of the court; but if the subject matter belongs to that class of which a court will take jurisdiction when the facts create some equitable right or the relation of the parties renders the exercise of such jurisdiction proper, an objection that there is an adequate remedy at law should be taken at the earliest opportunity. (Stout v. Cook, 41 Ill. 447.) The objection is properly taken by demurrer, and if so taken the demurrer may be general for want of equity. All matters which go to the jurisdiction of the court may be taken advantage of by demurrer, whether especially pointed out in the demurrer or not, and the objection may be called to the attention of the court on the argument of the demurrer (Winkler v. Winkler, 40 Ill.179; Wagelin v. Goe 50 id. 459; Gage v. Abbott, 99 id.366; Gage v. Griffin, 103 id.41; Wetherell v. Eberle 123 id.666.) If the objection is not made by demurrer the defendant may still insist in his answer that the case made by the bill is not brought within the class of cases in which courts of equity assume jurisdiction for the reason that the complainant has an adequate remedy at law; (1 Endy. of Pl & Pr.883;) but

In Lee v. Yates, supra, the court at page 326 dis-
cussing this question says: It is first contended that the
objection cannot avail to prevent our relief, for the reason
that the complainant has a complete remedy at law. The defen-
dant did not demur to the bill, but at the commencement of his
answer filed the same plea and presented the question as
it is now appearing plainly on demurrer to the bill. It
the subject matter of a bill of complaint is wholly foreign
to the jurisdiction of a court of chancery, such as a claim
of damages for trespass, assault and battery or criminal injury,
the court is incompetent to grant the relief sought for, and
it will be denied although the defendant has pleaded the dis-
pute to the jurisdiction of the court; but if the subject
matter belongs to that class of which a court will take jur-
isdiction when the facts create some equitable right or the
relation of the parties renders the exercise of such jurs-
diction proper, an objection that there is an adequate remedy
at law should be taken at the earliest opportunity. [Black v.
Cole, 2 Ill. 447.] The objection is properly taken by
demurrer, and it is taken too demurrer only to prevent the
ends of equity. Ill matters which go to the jurisdiction of
the court may be taken advantage of by demurrer, whether
sufficiently pleaded not in the demurrer or not, and the ob-
jection may be raised in the discretion of the court on the
argument of the demurrer [Cooper v. Sunday, 93 Ill.137;
Wallace v. Cox 82 Ill. 401; Hage v. Ayers, 98 Ill.280; Hage
v. Fritts, 102 Ill.267; Ingersoll v. Sherman 102 Ill.290.] If
the objection is not made by demurrer the defendant may still
insist in his answer that the case made by the bill is not
sufficient within the class of cases in which equity of equity
assume jurisdiction for the reason that the complainant has
an adequate remedy at law; if this, it is [Ill.322;] not

if the court is able to grant the relief asked for and defendant submits himself to the jurisdiction of the court without specially pointing out the objection in the answer it will be regarded as waived. An objection that the court ought not to assume jurisdiction because there is an adequate remedy at law comes too late after filing an answer in which the objection is not affirmatively set out and relied on. (Nelson v. First Nat. Bank of Chicago, 48 Ill.36; Ryan v. Duncan, 88 id. 144; Chicago Public Stock Exchange v. McClaughry 148 id. 372; Kaufman v. Wiener, 169 id.596; Black v. Miller 173 id. 489.) Although defendant in his answer claimed the same right and advantage as if he had especially demurred to the bill, he did not point out or rely upon the objection now made, and the court being competent to grant the relief asked for, the objection comes too late and will not be considered."

It is next insisted by appellant that the evidence in the record does not warrant a decree in appellee's favor. The evidence of appellee tends to show that appellant proposed to sell him his ten shares of stock in said corporation and that he stated at the time that the business of said corporation was good and that his reason for wanting to sell was because he wanted to go in the grocery business; that appellee inquired of him as to the amount of the indebtedness owing by said corporation and that appellant stated that it was about $1800. and that appellee thereupon stated to him he wanted to know exactly and that appellant says, "I am just making up an invoice and I will telephone you." and that the next time he told him that the indebtedness was $1900. and that he would get a dividend of at least 5% for 1912 if he bought the stock and paid for it before the first of the year.

Appellee's evidence further shows that the indebtedness owing by said corporation at said time was $4265.

if the court is wide in giving the relief asked for and the
lawyer submits himself to the jurisdiction of the court
without specially pleading for the jurisdiction to be waived it
will be regarded as waived. In England the fact the court
ought not to assume jurisdiction unless there is a dispute
ready as law cases for late after filing in answer in which
the objection is not affirmatively set out and relied on.
(Dicson v. First Nat. Bank of Chicago, 26 Ill.App. Dpm v.
Bauer, 26 Ia. Jan; Chicago Title Trust Company v. Wolfsohn
cy 210 Ia. 272; Carlson v. Cooper, 126 Ia.320; Turck v. Wilson
172 Ia. 444.) Although authority in the matter claimed the
same right and advantage as if he had absolutely insisted to
the bill, he did not assist nor only upon the objection was
made, and the merit being considered in order to relief asked
for, the objection comes too late and will be considered."

It is well insisted by appellant that the pretense
in the record upon not without a leave to defendant's first.
The evidence of appellee tends to show that appellant gave
proof to well the bill the delay of it or its only correspondence
and that he stated at the time that the business of that time
position was good and that its reason fly working to well was
because he needed it in the already budgeted. Will testimony
therefore of his as to the amount of his indebtedness owing to
such corporation and that specified stated that it was worth
$1000, and that appellee thereupon stated to him to secure to
him exactly and that specified sum, "I am ready to do
business and I will be answer you." Our that the well time be
take the best the constitution our $1000 and that he would
not a disaster of at least on the bill if to insure the crops
and pick for it before the first of the year.

Appellee's evidence tended also that the change
lawyer owing by said corporation at with time when Smith

Appellant in his testimony admits that he told appellee that the indebtedness owing by the corporation was between seventeen and nineteen hundred dollars, and that he told him there was $1000.00 ~~min~~ owing on some machinery that had been bought in connection with an excavating or drainage business that the corporation had taken on, but denied that any representation he made to appellee were made for the purpose of inducing appellee to purchase the stock or that appellee relied on the same. It being the contention of appellant that appellee was in a position to know and to ascertain for himself as to the real condition of the corporation. The record discloses that appellant was the Secretary and Treasurer and had been in large part, the manager of said corporation and as such was in a position to know its financial condition. We think the evidence warrants the finding of the master and the court to the effect that appellee prior to making said purchase made definite inquiry with reference to the outstanding indebtedness owing by the corporation for the purpose of ascertaining the true condition of the company in order to determine whether or not he wanted to buy the stock, and that appellant knew that appellee was relying on his representations.

In the argument of counsel for appellant they insist that appellant in representing the indebtedness of the company to be about $1900. had reference to the marble business conducted by said corporation and that he had no reference to the indebtedness that was owing by said corporation in in connection with its excavating or drainage business. We see no merit in this argument for this was all business being conducted by this corporation and it was just as much liable for indebtedness incurred in one line of its business as it

was in another. The question asked by appellee of appellant was as to the amount of indebtedness owing by the corporation and the answer given by appellant was general and not limited to any particular line. On the whole we are satisfied with the findings of the master and the decree of the court on that controverted question, and believe that the evidence supports the same.

It is next insisted by appellant that the court erred in awarding interest from March 5, 1913, the date of the filing of the bill, on the sum of $1285.00. Appellee concedes that this point is well taken. The amount due at the time the decree was rendered as we understand is $1285.00 and that includes the $1000. paid by appellee for said stock together with interest thereon at the rate of 5% per annum from the date of the said payment up to the date of the decree. The decree will therefore be modified by striking out that part of said decree awarding interest on said sum of $1285. from March 5, 1913 to date of decree.

Finding no reversible error in the record said decree as modified is hereby affirmed.

As the objection with reference to said interest is meritorious it is ordered that appellee pay one half (½) of the costs of this appeal.

Decree as modified affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th *day of* Oct. *A. D. 191*7.

Clerk of the Appellate Court

NOINI

607a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ethel Scott,
Appellee

No. 26
MARCH TERM. 1919.
vs.

East St. Louis & Suburban Ry. Co.,
Appellant

214 I.A. 657 4

~~ERROR TO~~
APPEAL FROM

Circuit COURT

~~St. Clair~~ COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

No. 26. In the Appellate Court Agenda No.17

of Illinois, Fourth District.

March Term A. D. 1919.

Ethel Scott, Appellee,	)	
vs	)	Appeal from St. Clair County
East St. Louis & Suburban Railway Company, Appellant.	)	Circuit Court

Opinion by Boggs, J.

This appeal is prosecuted by appellant to reverse a judgment for $10,000. recovered by appellee in the Circuit Court of St. Clair County for personal injuries sustained by her in a collision between appellant's street car and an automobile in which she was sitting.

The record discloses that on April 7, 1918, in the City of Belleville, Illinois, appellee with two other ladies were sitting in the rear of a large Studebaker automobile which had been parked on the north side of Main Street and a few feet West of the West line of Chestnut Street in said City. Appellant's cars are operated on a single track on Main Street in said City and between Lincoln Street and Chestnut Street the Company maintains a switch or passing track, the westerly point of the switch being at about the Westerly line of Chestnut Street. At about six o'clock in the evening a West bound car was derailed by the rear trucks leaving the track at the switch point near the west side of Chestnut Street. The rear end of said car swerved out toward the north curb on said Street and struck the rear end of said automobile, shoving it forward several feet against the curb. The south rear wheel of the automobile was crushed in against the

No. 29. In the Appellate Court of Illinois, Fourth District. March Term A. D. 1919.

Chas. Scott, Appellee,	
vs.	Appeal from St. Clair County
East St. Louis & Suburban Railway Company, Appellant.	Circuit Court

Opinion by Boggs, J.

This appeal is prosecuted by appellant to reverse a judgment for $15,000, rendered by appellee in the circuit court of St. Clair County for personal injuries sustained by her in a collision between appellant's street car and an automobile in which she was riding.

The record discloses that on April 7, 1918, in the city of Belleville, Illinois, appellee with two other ladies was sitting in the rear of a large Dodge-Brother automobile which had been parked on the north side of main street and a few feet west of the east line of Charlotte street in said city. Appellant's car was operated on a single track on Main Street in said city and between Illinois Street and Charlotte Street the Company maintains a switch or passing track. The westerly point of the switch being at about the westerly line of Charlotte street. It seems all right in the passing of a car bound east was operated by the car crew leaving the track at the switch point near the west side of Charlotte Street. The rear end of said car swerved out around the north rail on said track and struck the rear end of said automobile, causing it forcefully against the curb. The south rear wheel of the automobile was crushed in against the

body, the fender was bent and the housing on the rear axle was broken.

Appellee was seated on the side of the automobile next to the point of collision and after the impact either fainted or became unconscious and was lifted out of the car on to the sidewalk where she was revived by throwing water in her face. Appellee was then taken to a nearby house and later on removed to her home where she was confined to her bed for several days.

The declaration consists of one count and charges among other things that appellee's condition was the result of the injurtes suffered by the collision and that such injuries were permanent. A plea of the general issue was filed by appellant and a trial was had resulting in a verdict and judgment as above set forth. Appellant offered no evidence on the hearing and counsel for appellant in their argument concede that appellant, company, is liable, but insist that the Court erred in its rulings on the evidence and that the verdict of the jury is excessive and for these reasons seek a reversal of said judgment.

The main argument of counsel for appellant is devoted to the proposition that the verdict of the jury is excessive. Dr. DeHaan, appellee's physician testified:- that on the morning following the accident he called on appellee and found her in a partially unconscious condition, having a bruise on the back of her neck; that appellee at the time was vomiting and was complaining of pain in her back and in the back of her neck and of head ache. The doctor further testified that in his judgment appellee had suffered from a partial concussion of the brain and stated that appellee was a nervous wreck.The evidence further tends to show that

appellee had what is called chorea, or St. Vitus' Dance, and that her condition was gradually growing worse. Her left arm and leg were continually jerking and she was continually moving her fingers and was picking at her clothing when awake and with the bed clothing when asleep. Her lips would twitch continually, and she was in a highly nervous condition all the time.

Appellee was under the doctor's care from the time of the accident to the date of the trial, a period of about seven or eight months. The testimony further discloses that prior to the accident appellee had been in a good state of health with the exception of a uterine trouble she had in 1915 and 1916, but from which ailment the record discloses she had fully recovered. Prior to the injury appellee had done the principal part of the housework such as cooking, washing, ironing, etc. in a family of five and quite frequently aided her mother in the field in preparing vegetables for market.

Some four or five witnesses in addition to the physician testified as to appellee's condition, all being to the effect as above set forth. There was no evidence offered by appellant, nor is there any evidencein the record contradictory of said testimony.

It is the contention of appellant that appellee's impaired condition of health is not shown to be permanent and that unless permanent the verdict is excessive. Dr. DeHaan testified he was unable to state whether or not appellee might finally be cured. In other words, he was unable to state whether or not her impaired condition of health was permanent. Whether or not appellee's health is permanently impaired the record fully discloses that instead of growing better she is growing worse and it necessarily follows that she must at least for a time suffer from the conditions above set forth.

appellee had work in Saint Joseph, at St. Joseph's Center, and that her condition was gradually growing worse. Her left arm and leg were continually jerking and she was continually moaning. Her fingers was was giving at her clothing from pain and at at the bed clothing was asleep. Her jaw would twitch continually, and she was in a highly nervous condition all the time.

Appellee was under the doctor's care from the time of the accident to the date of the trial, a period of about seven or eight months. The testimony further discloses that prior to the accident appellee had been in a good state of health with the exception of a chronic tonsilitis and in 1919 and 1921, but from which she had recovered. Since the accident she had daily recovered. Later in the injury appellee had lost the physical part of the accident such as jerking, twitching, trembling, etc. In a family of five and quite frequently aided her mother in the light in preparing vegetables for market.

Some four or five witnesses in addition to the physicians testified as to appellee's condition, all being to the effect as above set forth. There was no evidence offered by appellant, nor is there any evidence the record contradictory of said testimony.

It is the contention of appellant that appellee's impaired condition of health is not shown to be permanent and that medical permanent the results in recovery. In. Wagner testified he was unable to state whether or not medical aid finally is used. In other words, he had no means to state whether or not her nervous condition of health was permanent. Appellee's health is permanently impaired the record fully evidence that instead of growing better she is growing worse and it necessarily follows that she must at least be a time suffer from the disabilities above set forth.

In determining the amount of damages a party is entitled to recover where an injury is shown, the jury have the right to take into consideration all the consequences of the injury, future as well as past, which are shown by the evidence to be reasonably certain to result from the injuries. Frisley Co. v. Burke, 203 Ill.250.

In Lauth v. Chicago Union Traction Co. 244 Ill.244, at page 252 the Supreme Court in quoting from Strohm v. New York, Lake Erie and Western Railroad Co; 96 N.Y.305, says "Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded, but to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury".

While we are of the opinion that the verdict is amply large at the same time we are not justified under the law in setting aside the verdict of the jury, in this character of case unless we are able to state that the jury in order to render the verdict complained of was moved by passion or prejudice, and this we are not able to do. Baker v.Fritts 143 App.465; North Chicago Street R.R.Co.v.Zeiger 182 Ill.12;

In determining the amount of damages a party is entitled to recover where an injury is shown, the jury have the right to take into consideration all the consequences of the injury, future as well as past, which are shown by the evidence to be reasonably certain to result from the injurious. Trinity Co. v. Dodge, 221 Ill.284.

In Lewis v. Chicago Union Traction Co. 246 Ill.248, at page 251 the Supreme Court in quoting from Cooley v. New York, Lake Erie and Western Railroad Co. 84 N.Y.772, says "Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded, but in matters such speculated consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not proper to be considered in assessing the damages. It is not enough that the injurious conduct may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to develop. To sustain a plaintiff's recover present damages for future consequences there must be such a degree of probability of their happening as amounts to a reasonable certainty that they will result from the original injury".

While we are of the opinion that the verdict is manifestly large at the most time we are not justified under the law in setting aside the verdict of the jury, in this charge. In of case unless we are able to state that the jury in their determination of the verdict of was moved by prejudice or passion, and this we are not able to do. Baker v. Illinois Cent. Ry. Co. 246 Ill.247;

It is next contended by appellant that the Court erred in its rulings on the hypothetical question put by appellee's counsel to the witness, Dr. Lehaan. It is first contended, that said question did not include all of the elements that the record discloses should have been included. When the question was asked and was objected to by counsel appellant on the ground that it did not include all of the elements that should be included, Counsel for appellee requested appellants counsel to specify the elements that were not included stating he would include them. Thereupon counsel for appellant stated certain elements that he thought ought to be included in the question and counsel for appellee included them. Appellant then objected to the question as amended but failed to specify any specific ground of objection. The Court overruled the objection and permitted the witness to answer the question.

We are of the opinion that there was no error in the ruling of the Court. Before appellant can urge an objection of this kind in the Appellate Court he must have specified the specific ground of objection he had to the question and have given the lower Court an opportunity to pass on the same.

In Riverton Coal Co. v. Shephard, 267 Ill.395, the Supreme Court in discussing a question of this character on page 397 says: "It is first claimed that the trial Court erred in permitting Otto Venneborg to answer a hypothetical question put to him. This question is quite lengthy and includes the elements upon which appellees base their case, and from these elements the witness was asked his opinion as to the cause of the explosion. It is claimed that this question assumes that there was coal dust circulating in the air, and does not contain all of the elements necessary to a proper answer to

the question. An examination of the record shows that the objection as made was not specific and did not point out the elements alleged to have been omitted. It was certainly not the duty of the trial Court to go through the record to ascertain whether all of the elements were included in the question, and it was the duty of the appellant to call the specific attention of the Court to the omission, and failing to do so it certainly has no cause of complaint in this Court..... If counsel for the defendant claimed that other material facts should have been included in the hypothesis they had a right, on cross-examination, to take the opinion of the witness upon their version of the testimony. On the objection made the Court did not err in its ruling upon the question."

Another objection to said hypothetical question is that it invaded the province of the jury in allowing the witness to answer a question that should finally be found by the jury. The question submitted to Dr. Deffenn assumed the occurrence of the accident and the manner in which the evidence tended to show appellee received her injury, and then assumed the conditions that there shown by the evidence to have occurred with reference to appellee's physical condition and with reference to her being nervous, and he was then asked, "now then would you say that the present condition of her health and body might have resulted from the accident that has been described?" His answer being, "I consider her present condition due to that".

It is true that an expert witness has no right to speculate or surmise or presume with reference to what might or might not have caused certain injuries or conditions, but it must be shown that the conditions follow with reasonable

the question. In examination of the record shows that the objection he made was not specific and did not point out the character alleged to have been omitted. It was certainly not the duty of the trial Court to go through the record to ascertain whether all of the elements were included in the charge, and it was the duty of the appellant to call the specific attention of the Court to the omission, and failing to do so it certainly has no cause of complaint in this Court..... It seemed for the defendant plaintiff that other material facts should have included in the charge, thereby that had a right, on cross-examination, to take the opinion of the witness upon those matters of the testimony. On the objection made the Court has not err in its ruling upon the question.

The fourth objection to said hypothetical question is that it invaded the province of the jury in allowing the witness to answer a question that should finally be issued by the jury. The court's in ruling in Jackson against the testimony of the witnesses and the verdict in which the witness tended to show aggravated circumstances, and that warranted the conviction this Court finds error in the evidence to have admitted with reference to accused's physical condition was with reference to his being drunk, and he was upon sober, "the true question was what the personal condition of the health and body might have required from the evidence that the body disclosed". The answer being, "I considered he present health, from the to what".

It is true that an expert witness may be right to testimony or question with reference to the right or wrong and from proper certain hypothetical questions, but it must be shown that the qualifications fulfill requirements

certainty as the result of the injury, and where there is a conflict in the evidence as to whether a party is injured in the manner claimed, it is not competent for a witness to give his opinion on that subject;

Where however, there is no dispute as to how the injury occurred and the only question is as to whether certain physical conditions were caused by the injury complained of, if the determination of the question involved special skill, training or knowledge that the ordinary person does not possess, then persons possessing such special knowledge, skill or training may give their opinion on such question. City of Chicago v. Didier 227 Ill.575.

It is also insisted by appellant that this was not a case for expert testimony and that the jury should draw the conclusions from the facts established by the evidence. We do not agree with such contention but are of the opinion that this is a very proper case for expert testimony as to the question here to be determined is as to whether or not appellee's condition followed by reason and as a result of the accident and injury in question and is one of skill and calls for expert testimony. The Court did not err in its ruling on the hypothetical question.

Finding no reversible error in the record the judgment of the trial Court will be affirmed.

Affirmed.

Not to be reported in full.

certainly as the result of the injury, and there is a conflict in the evidence as to whether a party to injured in the manner claimed, it is not competent for a witness to give his opinion on that subject.

Under another, there is no dispute as to how the injury occurred and the only question is as to whether certain physical conditions were caused by the injury complained of, if the determination of the question involved expert skill, training or knowledge that the ordinary person does not possess, then persons possessing such special knowledge, skill or training may give their opinion on such questions. Gulf of Alabama v. Jaber 127 111.372.

It is also insisted by appellant that this was not a case for expert testimony and that the jury should draw the conclusions from the facts established by the evidence. We do not agree with such contention but are of the opinion that this is a very proper case for expert testimony as to the question also to be determined is as to whether or not appellee's condition followed by reason and as a result of the accident and injury in question and is one of skill and value for expert testimony. The Court did not err in the ruling on the objectionable questions.

Finding no reversible error in the record the judgment of the trial Court will be affirmed.

AFFIRMED.

and is so ordered in toto.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 10th *day of* Feb. *A. D. 191*9.

Clerk of the Appellate Court

NOINI

608a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

St. Louis Brewing Association,
Appellant

No. 39
MARCH TERM, 1919.

vs.

F. W. Bersche et al,
Appellees

214 I.A. 657 5

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 39. In the Appellate Court Agenda No.23

of Illinois, Fourth District

March Term, 1919.

State ~~Bord~~ Bank of Prairie du Rocher, Complainant, vs F. W. Bersche, Cora C. Bersche, St. Louis Brewing Association, and Joseph Horrell, Conservator of Charles Horrell, Insane, Defendants.	Appeal from Circuit Court Randolph County, Illinois.
St. Louis Brewing Association, Appellant, vs. F. W. Bersche and Cora C. Bersche, Appellees.	

By Boggs, J.

The State Bank of Prairie du Rocher filed a bill in equity to the March Term, 1917, of the Circuit Court of Randolph County, Illinois, to foreclose two mortgages given by appellees, Cora C. Bersche and Fred W. Bersche, husband and wife. Appellant was a judgment creditor and was made party defendant. The bill alleged the execution and delivery of the notes and mortgages sought to be foreclosed, their assignment to said Bank, and the default of appellees in payment of the same. Said bill further alleges that appellees were non-residents of the State of Illinois and alleges that appellant was a judgment creditor in the sum of $759.24 and that one Joseph H. Horrell, conservator, held a judgment against appellees for $307.33. Appellees answered said bill denying the allegation of non-residence, and setting up a claim of homestead in the premises as against said judgment liens.

Term No. 78. In the Appellate Court Opinion 78.58
of Illinois,Fourth District
March Term, 1978.

State of Illinois ex rel. Appellee,	
vs.	
1. G. Barrett, Inc. 1. partner, 2. Lucky Drewing Investment, and Jacob Estell, Guarantor of Lucky Estell, Lessee, Defendants.	Appeal from
	Circuit Court
3. Louis Drewing Investment,	Sangamon County,
Appellant,	Illinois.
vs.	
1. G. Barrett and Inc. 1. Barrett, Appellees.	

Mr Justice, D.

The State Law of Illinois ex Rather Jiles a suit in equity to the March Term, 1977, of the Circuit Court of Sangamon County, Illinois, to foreclose the mortgages given by appellees, Inc. 1. Barrett and Inc. 1. Barrett, Lessee and wife. Appellant was a judgment creditor and was made party defendant. The suit alleged the execution and delivery of the notes and mortgages sought to be foreclosed. Only assignment is such that, on the account of assistance is payment of the same. This will further allege that appellees were non-residents of the State of Illinois and alleged that appellant was a judgment creditor in the sum of $728.34 and that one Joseph 1. Barrett, nonresident, had a judgment against appellees for $327.35. Appellees answered and did deny the allegations of non-residence, and setting up a claim of homestead in the premises as against said judgment liens.

Appellant also filed an answer setting forth its judgment and alleging that same was a prior lien to the Morrell judgment. On reference to the Master, no evidence was offered by any of the parties touching the question of homestead. The Master found that the complainant, Bank, was entitled to a foreclosure and the amount due to it to be $2353.63 with interest from date of finding; that appellant had a judgment lien of $759.24 with interest from September 18th, 1916, which was subsequent and inferior to said mortgage lien, and that subject to both of said liens, Joseph W. Morrell, conservator, had a judgment lien of $387.33 with interest from September 26th, 1916. Said report was approved by the Court and the Master was ordered to sell said premises and out of the proceeds of said sale to first pay the costs and then the amount found to be due the complainant, and in the event a surplus remained after paying said sums, to bring the same into Court, to abide the further order thereof. Pursuant thereto the Master sold said premises to one Robert Bethman, Trustee for appellant for the sum of $3256.76. The report of said sale by the Master was approved by the court, and the Master's report of distribution showed payment to complainant, Bank, of $2149.93, the receipt of appellant for $781.38 and payment of court costs and Attorney fees, making a total disbursement of $3256.76. This report was approved September 24th, 1917.

On February 7th, 1918, appellees filed a motion that the order of June 1st, 1917, approving Master's report of sale be set aside and that he be required to reform said report so as to show a surplus of $567.83, that being the amount left from proceeds of sale after payment of amount due said Bank under the decree of foreclosure and cost, and

Upwards also filed an answer setting forth the
payment and alleged that there was a prior lien in the
Bristol payment. The referee in the hearing, on evidence
was offered by any of the parties touching the question of
insolvency. The Master found that the complainant, Dodd, was
entitled to a preference and he amount due to it to be
$[illegible] with interest from date of filing; that appellant
had a judgment lien of $[illegible] with interest from September
1818, 1818, which was subsequent and inferior to said mort-
gage lien, and that subject to both of said liens, Joseph S.
Everett, conservator, had a judgment lien of $[illegible] with
interest from September 1818, 1818. Said report was approved
by the Court and the Master was directed to sell said premises
and out of the proceeds of said sale to first pay the costs
and then the amount found to be due the complainant, and in
the event a surplus remained after paying said sum, to retain
the same into Court, to abide the further order thereof.
Pursuant thereto the Master sold said premises to the Bank of
Gatemen, Trustee for creditors for the sum of $[illegible]. The
report of said sale by the Master was approved by the court,
and the Master's deed of conveyance thereof to Gamble-
Skogmo, Inc., of $[illegible], the highest and responsible bid-
der, was approved. It must appear that said sale, leaving
a total deficiency of $[illegible]. This report was approved
September 26th, 1927.

On December 7th, 1927, appellee filed a motion for
the order of June 1st, 1917, approving Master's report of
sale be set aside and that he be permitted to interpose said
report as an in rem a surplus of $[illegible] that being the
amount left from proceeds of sale after payment of amount due
said Dodd under the Decree of Foreclosure and fees, and

that the Master bring same into court in compliance with the terms of the original decree and that said surplus be ordered paid to appellees to apply on their homestead estate in premises sold.

Appellant resisted said motion, but upon hearing the evidence of the respective parties, the chancellor on July 15th, 1918 found that the Master had sold said premises in compliance with the original decree for $3256.78 and that the purchaser had paid thereon to the Master, the sum of $2688.50 leaving a balance due to the Master of $567.96 which was wrongfully withheld by the purchaser, and applied upon the debt of appellant. The court ordered appellant to pay said Master the sum of $567.96 within thirty days, and in default of payment within said time, that the Master's sale and order approving same, be set aside and a new sale of said premises be made. Appellant paid said sum to the Master and November 15th, 1918, the Court entered an order finding appellees entitled to a homestead interest in said premises, and entitled to the surplus in the hands of the Master to apply thereon and he was ordered to so pay the same to them. To reverse said order, appellant prosecutes this appeal.

The principal assignment of error made by appellant is that appellees were entitled to a homestead estatein the premises in question. There is no question but that appellees had acquired a homestead in the premises and that such interest was waived and released so far as complainant, Bank, was concerned, but the controverted question on the record is as to whether appellees had abandoned said homestead so as to make said premises subject to appellant's judgment lien

The evidence in the record discloses that appellee,

F. W. Bersche had been in the saloon business at Prairie du Rocher and had become addicted to the excessive use of intoxicating liquors; that he was falling behind financially and it was apparent that appellees were about to lose their home by foreclosure. After repeated attempts to dispose of their homestead, they rented it and moved to St. Louis, Mo., in September, 1916. They had a sale and either sold or took with them all of their household effects except an old tin cupboard and some shelving left in the cellar. The premises were rented from month to month. Appellees never returned to this property except to visit the tenant for about a week while collecting accounts or on other business. The only evidence to the contrary is the testimony of appellees on the hearing on motion to set aside report of distribution, to the effect that they at some future time intended to return. We are of the opinion that appellees conduct was more in keeping with the idea of an abandonment of their homestead than that they intended to return to it. Appellees had become convinced that they could not hold saidpremises and pay their indebtedness thereon and determined to rent it, and obtain all the revenue therefrom as long as possible. The declarations of appellees at the time of leaving said premises were that they would come back or be back and see the people again. Said declarations were not that they were coming back to their former residence and are not evidence of an intention to retain their homestead. An equivocal intention to return is not sufficient; it must be absolute and unconditional. Ross v. Wylezolek, 207 Ill.331; Jackson vs. Sackett, 146 Ill.646; Cobeen v. Mulligin, 37 Ill.230.

We do not deem it important that they left the shelves and cupboard in the cellar.

While appellees claimed a homestead in their answer, yet they did not appear before the master to offer evidence in support thereof and this is further evidence of an intention to abandon their claim thereto. Hopkins v. Cofoid. 103 App. 176.

Other errors were assigned on the record but in view of what we have already said it is not necessary to discuss the same.

For the reasons above set forth the judgment of the Circuit Court is reversed and said cause is remanded with direction to enter an order consistent herewith.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* June *A. D. 191*7.

Clerk of the Appellate Court

NOINI

(609a)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

214 I.A. 658

The People of the State of Illinois, Appellee

No. 8
MARCH TERM, 1919.

vs.

Harry Beadle, Appellant

~~ERROR TO~~
APPEAL FROM

County COURT

Jefferson COUNTY

TRIAL JUDGE

HON. A. D. WEBB

Term No. 8. In the Appellate Court Agenda No.3

of Illinois, Fourth District.

March Term, A. D. 1919.

The People of the State of Illinois, Appellee. vs. Harry Beadle, Appellant.	Appeal from the County Court of Jefferson County.

Appeal from the County Court of Jefferson County; the Hon. Andrew D. Webb, Judge Presiding. Heard in this court at the March Term 1919. Reversed and remanded. Opinion filed _____.

Eagleton, J.

This is a criminal case and comes to this court by appeal. "The law does not authorize an appeal in a criminal case..... . But the appearance of the People was entered and there was a joinder of error. The cause was submitted for our decision upon the errors assigned on the record, and inasmuch as everything essential to a hearing upon a writ of error is before us, we will treat the case as being here on a writ of error." Graff vs The People 208 Illinois 312.

Harry Beadle, who will hereafter be referred to as the defendant, was tried in the County Court of Jefferson County on an indictment charging him with assault with a deadly weapon with intent to inflict a bodily injury on the person of G. Pliny Baldridge.

Baldridge was commissioner of highways of Grand Prairie Township, Jefferson county at the time of the alleged

Term No. 9. In the Appellate Court Agenda No.5
of Illinois, Fourth District.
March Term, A. D. 1919.

The People of the State of Illinois, Appellee.	
vs.	Appeal from the County Court
Harry Smalls,	of Jefferson County.
Appellant.	

Appeal from the County Court of Jefferson County; the Hon. Andrew S. Cain, Judge presiding. Heard in this court at the March Term 1919. Reversed and remanded. Opinion filed _____.

Empleton, J.

This is a criminal case and comes to this court by appeal. "The law does not authorize an appeal in a criminal case.....; but the ignorance of the People was endured and there was a jointer of error. The cause was submitted for our decision upon the errors assigned on the record, and inasmuch as everything essential to a hearing upon a writ of error is before us, we will treat the case as being upon a writ of error." Grail vs The People 206 Illinois 212.

Harry Smalls, who will hereafter be referred to as the defendant, was tried in the County Court of Jefferson County on an indictment charging him with assault with a deadly weapon with intent to inflict a bodily injury on the person of a. Ethel Hardrigs.

Defendant was convicted of assault of Ethel Estelle Tomsmith, Jefferson county at the time of the alleged

assault and was engaged in working on the roads in that township.

The defendant resided with his mother on a farm formerly owned by the father of the defendant. The mother had a homestead and the defendant with others was the owner of the remainder.

A public road runs along the east side of the farm and about one hundred and twenty feet from the house occupied by the defendant and his mother. There had been some dispute between the defendant and Baldridge about the west line of the road. The defendant insisting it extended only to a certain corner stone said to be the corner stone of the section. The defendant claimed on the trial that the prosecuting witness was entering upon the lands in possession of the defendant and his mother for the purpose of working the road and that the road did not extend where the prosecuting witness was entering.

The following question was asked to which objection was sustained by the court. "Tell the jury how long you have been in possession of the home place up to the west line of the road."

Thereupon the defendant offered to prove that the strip of land entered upon by the prosecuting witness and his son was in the peaceable possession of the defendant. This was objected to by the People and the objection sustained and the defendant excepted. On offer of further proof the court held that it might be shown that the strip of ground in question had never been the traveled public road. Pursuant to this ruling the defendant and witnesses called by him testified that the strip of ground where the altercation took place had never been traveled or used as a public highway.

assault and was engaged in grappling on the bridge in that direction.

The defendant resided with his father on a farm formerly owned by the father of the defendant. The subject had a disagreement and the defendant with strong was the owner of the roadster.

A public road runs along the east side of the farm and about one hundred and twenty feet from the house occupied by the defendant and his father. There has been disputes between the defendant and deceased about the west line of the road. The defendant insisting it extended only to a certain corner stone and to be the correct stone of his position. The deceased claimed on the trial that the previous attempt was erecting upon the lands in possession of the defendant and his father for the purpose of making the road and that the road did not extend where the erroneously stones was entering.

The following question was asked to which objection was overruled by the court. "Will the gentlemen tell you have been in possession of the farm given up to the west line of the road?"

Thereupon the defendant stated in part that the strip of land entered upon by the prosecuting witness and his son was in the peaceable possession of the defendant. This was objected to by the counsel and the objection sustained and the defendant excepted. At other or instance proof the court held that it might be shown that the strip of ground in question had been used for the traveled public road. Convinced to this ruling the defendant and witnesses called by him testified that the strip of ground where the altercation took place had never been traveled or used as a public highway.

It is argued that the trial court erred in this ruling and certain cases are cited in support of the position of the defendant. The People insist there was no error in the holding and contend it was the duty of the defendant to appeal to the courts to determine the rights of the parties.

In the case of Woodman vs Howell 45 Ill. 367 on page 370, the Supreme Court discussing this question say:

"To permit all persons at their mere will to enter and remain in another's house, or even his close, so long as they may choose, and this too after being requested to depart, would well nigh destroy the dominion of the owner over his property, and would render it almost useless as well as worthless.....Although it might not be so offensive to permit it on the close of the owner as his dwelling, it would be an outrage upon his rights. Such has never been the law, and so long as there is such thing as individual ownership of property it is not probable that such will ever be".

While it is true the above is a civil case it can not be said the rule would render one liable criminally where he would not be liable in a civil action.

The rule announced in the above case has been followed in the following cases:

Phillips et al vs City of Springfield 39 Ill.83; Illinois Steel Co. vs. Novak 84 Ill.App.641; and Illinois Steel Co. vs Wazinus 101 Ill.App.535.

The ruling of the court denying the defendant the right to show possession of the strip of land in controversy was error. While the defendant was permitted to show that the public had not travelled west of the corner stone he was not permitted to show any right or authority to act as the

It is argued that the total circumstances in this
ruling are certain cases any right in support of the prec-
ise of the judgment. The single issue that arose was
exist in the judging and evidence is was the duty of the de-
fendant is allowed to the county to exercise the rights of
the juvenile.

In the case of Jackson vs.Lowell 40 Ill. App 2d
page 37. The Supreme Court discussing this question said:

"In exercis all previous of their rights to enter
and remain in another's house, it was the duty, as long
as they may choose, and this the action being requested to
leave, which will stop tempting the habitation of the owner
over his property, and small-mother is always evidence on
tell as evidence.....

In an affidavit is proof if on the close of the owner on
his evidence, it would be in evidence such his rights. Such
one drive from the jury, and so long as there is such right
or individual ownership of property, it is not probable that
they will stay far.

While it is true the place is public and it can
not be said the jury would judge the little economic where
he would not be taken to a civil action.

The jury considered the fire-alarm rule that fire-
lines in the fire-fighting vessel.

Liability of is to city of Springfield 88 Ill.App.
Illinois Appel Ct, 1st, Dept 88 Ill.App.2d, and Illinois
Appel Ct. 1st Dept 111 Ill.App.888.

The ruling of the court requiring the defendant the
right to show presence of the state of that is unnecessary
and error. While the defendant was entitled to show that
the public had not interfered with of the vessels alone he was
not entitled to give any right or authority or act as the

owner or party in possession.

The first instruction given for the People, and to the giving of which the defendant objected, was as follows:

"The court instructs the jury that if the use of a deadly weapon is proved, and the defendant relies upon self defense, or defense of his property, to excuse himself for the use of the weapon, the burden of showing such excuse is on the defendant, and, to avail him he must prove such defense by a preponderance of the evidence".

The People admit this instruction is erroneous but argue it is a harmless error. The effect of this instruction is to state to the jury that the defendant must establish a defense by a preponderance of the evidence. This contravenes the rule of law that the People must establish the guilt of the defendant by the evidence beyond all reasonable doubt.

Complaint is made by the defendant of instructions two, three, four, ten and fourteen given for the People. These instructions are each subject to the criticism that they fail to recognize such right as the defendant had in defending his property. This is true particularly of instruction number fourteen given for the People which is as follows:

"The court instructs the jury, that if you believe from the evidence in this case, beyond all reasonable doubt, that the defendant made an assault upon the prosecuting witness with a deadly weapon capable of producing a dangerous wound, in manner and form as charged in the indictment the jury should find the defendant guilty".

This instruction makes no reference to the right of the defendant to protect his property. There is another objection to this instruction that is serious and that is it omits all reference to intent to commit a bodily injury. Intent is the gist of the crime and a failure to prove intent

owner or party in possession.

The first instruction given for the trespass, and in the giving of which the defendant objected, was as follows:

"The court instructs the jury that if the use of a deadly weapon is proved, and the defendant raises some self defense, or defense of his property, in mitigation for the use of the weapon, the burden of showing such defense in the defendant, and, it would rest on most proper such defense by a preponderance of the evidence".

The court's object this instruction to criticize the weapon it is a dangerous error. The effect of this instruction is to state to the jury that the defendant must establish a defense by a preponderance of the evidence. This instructions was error of law and the trial must establish the guilt of the defendant by the evidence beyond all reasonable doubt.

Complaint is made by the defendant of instructions two, three, four, and fourteen given for the trespass.

These instructions are such malgent to the criticism that they fail to recognize such rights as the defendant had in defending his property. This is also particularly of instruction four number fourteen given for the trespass which is as follows:

"The court instructs the jury, that if you believe from the evidence in this case, beyond all reasonable doubt, that the defendant made an assault upon the prosecuting witness with a deadly weapon capable of producing a dangerous wound, in manner and form as charged in the indictment the jury should find the defendant guilty".

This instruction makes no reference to the right of the defendant to protect his property. There is another objection to this instruction that is material and that is it merely all petitioned to defend to commit a deadly injury, in that is the life of the person and a failure to prove intent

must work an acquittal.

The first of the defendant's refused instructions assumes that the prosecuting witness sought to take or use certain premises and was properly refused for that reason.

The second of defendant's refused instructions states that "the owner may oppose with force such entry". There is no exception contained in it and it was misleading.

The fourth of the defendant's refused instructions is objectionable in that it assumes that the prosecuting witness acted arbitrarily.

The sixth instruction offered by the defendant and refused by the court is open to the objection that it assumes the prosecuting witness was on the premises of the defendant.

It is argued by the defendant that a conviction cannot be sustained because of the fact that the indictment charges the defendant with having made an assault on G. Pliny Baldridge and the prosecuting witness gave his name as G. Pleny Baldridge. The names are idem sonans and being so the use of either for the other is not objectionable. There can be no doubt the defendant knew the person he was charged with assaulting.

For the reasons indicated the case is reversed and remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

Not to be reported in full.

must now be acquitted.

The light of the defendant's refused instructions assumes that the prosecuting attorney might in this or any certain premises and was properly refused for that reason.

The refusal of defendant's refused instructions alleges that "the court may engage with them much delay". There is no evidence contained in it and it was misleading.

The lapse of the defendant's refused instructions is objectionable in that it assumes that the prosecuting attorney acted arbitrarily.

The court instructions offered by the defendant and refused by the court is open to the objection that it assumes the prosecuting attorney was on the premises of the defendant.

It is argued by the defendant that a conviction cannot be sustained because of the fact that the indictment charges the defendant with having made an assault on a. Guy Eldridge and the prosecution witness gave his name as A. Guy Eldridge. The names are idem sonans and being as the use of either for the other is not objectionable. There can be no doubt the defendant knew the person he was charged with assaulting.

For the reasons indicated the case is reversed and remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*7.

Clerk of the Appellate Court

NOINI

Certiorari denied

6/02

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George W. Maxwell,
Appellee

No. 12.
MARCH TERM. 1919.

vs.

J. W. Howard,
Appellant

214 I.A. 658

ERROR TO
APPEAL FROM

Circuit **COURT**

St. Clair **COUNTY**

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 12. March Term, A. D. 1919. Ag. 6.

George W. Maxwell, Appellee vs J. W. Howard, Appellant.	Appeal from the Circuit Court of St. Clair County, Illinois.

Appeal from the Circuit Court of St. Clair County; The Hon. Louis Bernreuter, Judge, presiding. Heard in the Appellate Court 4th District at theMarch Term, 1919. Affirmed. Opinion filed _____1919.

Eagleton J.

This is an action of assumpsit by George W. Maxwell appellee, against J. W. Howard appellant. The appellee recovered a judgment of thirteen thousand dollars against the appellant. The case was tried before a jury and a verdict returned at the January Term, 1918. After motion for a new trial and in arrest of judgment had been overruled judgment was rendered on the verdict and appeal prayed.

In October 1914 appellant was engaged in the business of buying and selling horses and with one J. F. Carpenter had a contract with the French Government to furnish ten thousand horses. On October 10 Appellant, Howard, as party of the first part and the Appellee and the Sparks Mule and Horse Company, as parties of the second part, entered into a contract, in writing, wherein appellee agreed to purchase from said second parties the ten thousand horses to be furnished the French Government and also to purchase all horses to be furnished by said first party to the British Government during the life of said contract. One Carpenter was named as one of the parties of the first part in this contract but did

Term No. 12. March Term, A. D. 1919. No. 6.

George E. Maxwell, Appellee, vs. E. E. Lewis, Appellant.	Appeal from the Circuit Court of St. Clair County, Illinois.

Appeal from the Circuit Court of St. Clair County; The Hon. Louis Bartmeyer, Judge, presiding. Heard in the Appellate Court at December Term, 1918.

AFFIRMED. Opinion filed _____, 1919.

Negligence 4.

This is an action of assumpsit by George E. Maxwell against J. E. Lewis appellant. The appellee recovered a judgment of thirteen thousand dollars against the appellant. The case was tried before a jury and a verdict returned in the January Term, 1918. After motion for a new trial and in arrest of judgment had been overruled judgment was rendered on the verdict and appeal prayed.

In October 1914 appellant was engaged in the business of buying and selling horses and mule one C. Carpenter had a contract with the French Government to furnish ten thousand horses. On October 12 appellant, Lewis, as party of the first part and the appellee and the Carpenter Sale and Horse Company, as parties of the second part, entered into a contract, in writing, wherein appellee agreed to purchase from said second parties the ten thousand horses to be delivered the French Government and also to purchase all horses to be furnished by said first party to the French Government during the life of said contract. The Carpenter was named as one of the parties of the first part in this contract but did

not join in the execution thereof and had nothing to do with carrying out the terms of the contract.

Under the terms of this contract it was agreed that the net profit or loss should be paid by the parties to the contract equally. The contract further stipulated as to the price to be paid by first party to second parties as follows:

"The parties of the first part agree to pay to the parties of the second part one hundred seventy five dollars ($175.00) per head for all French horses that pass inspection, one hundred sixty five dollars ($165.00) per head to be paid when horses are accepted and branded and ten dollars($10.00) per head more to be paid when the contract is completed. The parties of the first part agree to pay to the parties of the second part for all horses that pass British inspection one hundred seventy five dollars ($175.00) to two hundred ten dollars ($210.00) per head, whatever price parties of the first part get."

Between October 3, 1914 and October 15, 1914 about five hundred forty six horses were furnished appellant by the parties of the second part under this contract. About October 15 the parties seemed threatened with financial difficulties and the appellant was seeking some changing in the contract.

Sometime after the above contract was entered into the Sparks Mule and Horse Company sublet to the Maxwell and Church Mule Company the furnishing of 5000 horses under this contract. A mistake was made in this subletting or rather the Sparks Mule and Horse Company agreed with the Maxwell Church Company that the horses were to be furnished at Oklahoma City and Springfield Mo. and the additional freight rates from these points were not considered and under the contract with

appellant this expense was to be borne by the second parties to the above contract.

On October 20, 1914 a conference was held in the offices of the Sparks Mule and Horse Company at St.Louis National Stock Yards. This conference was attended by representatives of the following corporations: Harper Brothers, Maxwell and Church Mule and Horse Company, Sparks Bros. Mule and Horse Company and Sparks Bros. Mule Company. Appellant and Appellee were also present. The purpose of this meeting was to arrange some plan for furnishing the horses provided for in the agreement of October 10, This conference lasted several hours. It was suggested that the several companies represented should furnish the horses to the appellant and it was also suggested that certain other parties should be taken into the syndicate. The appellee did not agree with some of the plans proposed and stated that he had a better contract as it stood than the one proposed. After considerable discussion a contract was written up which appellee refused to join in. Up to this point there is no substantial disagreement as to the facts.

Under the terms of this contract the persons representing the several corporations were to furnish the horses and the profits were to be divided into four parts and the representatives of the different corporations were to divide the portion coming to the members of such corporations equally.

At this meeting it was proposed that the appellee should have the same interest that the four Sparks should have. There were four stock holders in the Sparks Mule and Horse Company and under the arrangement the one fourth part of the profits were to go to the Sparks Mule and Horse Company and that be divided into four parts or each get the one sixttenth. If Appellee joined in the agreement that would divide the one fourth coming to the Sparks Mule and Horse

opposition this expense was to be borne by the second parties to the above contract.

On October 20, 1916 a conference was held in the office of the Quebec Gulf and Dove Company at St.Louis Sainte Marie, Tracy. This conference was attended by representatives of the rivalling corporations Dalgety Brothers, Donald and Gunter Gulf and River Company, Quebec Gulf and River Company and Quebec Gulf Company. Spectators and Quebec were also present. The purpose of this meeting was to discuss plans for furnishing the larger provinces for in the agreement of October 13. This preliminary talked lasted during. It was suggested that the several companies involved should form the terms in the agreement and it was also suggested that various other parties should be taken into the syndicate. The syndicate did not agree with some of the plans suggested and felt that he had a better contract by it than the one proposed. After considerable discussion a solution was written up which appeared to please. By so this point there is no substantial disagreement in to the facts.

Under the terms of this contract the various companies the several corporations were to finance the future and the profits were to be divided into four parts and the representatives of the different corporations were to divide the portion owing to the members of each corporation equally. It has a fact it was proposed that the Quebec should have one more interest that the Dalgety Brothers. There were four other parties in the Dalgety Gulf and River Company and under the arrangement the four fourth part of the profits were to go to the Dalgety Gulf and River Company and that so divided that part to each of the four parties. If the Dalgety Gulf in the agreement that with the exception the one fourth owning in the Quebec Gulf and River

Company into five parts and the appellee get one fifth of that portion or one twentieth.

Appellant contends that the final agreement was made on this basis.

On the other hand appellee contends that he refused to join in the agreement on that basis and that he and appellant made an agreement whereby appellee was to have the one sixteenth of the profits made by appellant.

Appellee contends that he insisted he had a better contract as it stood than he would have to get the part of the profits proposed in the agreement that he should share with the Sparks Bros. Horse and Mule Company part of the profits.

Appellant contends that the verdict and judgment rest on the unsupported testimony of appellee and that the verdict and judgment are against the weight of evidence.

Appellant also contends that the court admitted improper evidence on behalf of the appellee, that the court permitted counsel for appellee to ask leading questions of witnesses called in behalf of appellee, that the court improperly on motion of appellee struck out competent evidence and that the instruction offered by appellee and given by the court did not correctly state the law.

As to the first position of appellant. That the verdict and judgment rest on the unsupported testimony of appellee.

The parties agree that at the time the second contract was made they were having trouble and both assign the same reason therefor but do not agree as to the cause of it.

The appellee testified:

"So Mr. Howard was very anxious to make this new contract

Counsel said life, liberty and the pursuit of happiness were at stake in one business.

Counsel submitted that the trial judge had made no this point.

On the other hand counsel submitted that in view in the statement on that basis and that he had not applied such an argument would only amount to have the one minutes of the practice made by applicant.

Counsel submitted that he looked to the a rather contrast as it would then be would have to set the part of the utility provided in the statement that he would would with the Sports Arts. Here was quite complete part of the position.

Mr. Allen contended that the verdict and judgment not in the unsupported testimony of opposite and that the verdict and judgment are against the weight of evidence.

Counsel also contended that the court admitted in proper evidence on behalf of the opposite, that the court permitted counsel for opposite to make improper questions of witnesses called on behalf of respondent, that the court improperly in motion of opposite counsel and employed language and that the instruction given by opposite not given by the court did not correctly state the law.

As to the first position of appellant, that the verdict and judgment rest on the unsupported testimony of opposite.

The position upon that at our view the evidence supports the verdict. Sports Arts Counsel Counsel with respect the same charge that in the course of it.

The opposite testified:

"Q. Because we very anxious to make this one opposite

which would put him from a profit sharing basis to a flat rate on each horse that was sold- on each horse that was taken- and to have me satisfied and have the deal go through, he said he would give me just as much out of his pocket as the profit I would make on joining or signing with the syndicate. I said I was satisfied that way.....Mr. Howard told me that if I would sign up with these people-- with the syndicate-- he would pay the portion that I would enjoy of the syndicate's profits, or a sixteenth of the profits they made on the day of the sale of these horses.....I said I was satisfied with that arrangement- The profits were to be paid to me to let the deal go through without a hitch, because I had objected and wanted to stand on my contract, as I was making more than I could have made if I had signed at a sixteenth. That proposition was made and accepted in the room where these seven or eight dealers were in conference. When we settled that question I said 'As long as I am not a member of the syndicate this doesn't interest me any further', and I excused myself".....Mr. Howard followed me out.....He asked me if I wanted the proposition he had made me.....in writing. I told him I did not care to have it in writing..... I am not furnishing any horses. I was to do no work."

Appellant testifying about the same transaction said in part:

"I made this trade with George Maxwell. He didn't want to sign the contract and he said that if I would collect his part from all these firms and pay it to him he would make this deal. That conversation was had in the alley. I called Maxwell out and I told him it suited me to make this deal, and I would be glad if he would make it.....Maxwell said that if I would collect this money from all these dealers- they had all proposed to pay their proportion- to put up their propor-

tion- just the same as the Sparks Mule and Horse Company."

It also appears from the testimony of other witnesses called during the trial that appellant and appellee conferred and the appellant reported to the other persons in the conference that appellee had agreed and thereupon the contract of October 20 was executed. This contract was not signed by appellee.

Frost Sparks testified in part as follows:

"Mr. Howard said in Mr. Maxwell's presence, 'George has agreed to go ahead and will make the deal, and you-all to pay him....You-all to pay him so much of your profits- pay me so much of your profits and I will pay it to him"

Warren Bailey said "If I remember correctly when the contract was brought up Mr. Maxwell refused to sign it and Mr. Howard went out and had a conference with Mr. Maxwell- Mr. Howard came back and said that they would accept the proposition. I don't know whether Mr. Maxwell came with him or not. I think Mr. Howard said he would take care of Mr. Maxwell. That he would take care of his interest- I don't remember exactly his expression."

Harry C. Sparks testifiedin part as follows:

"I remember them going out of the room together, and when they came back he said he had agreed with Mr. Maxwell and we was to go ahead and make the trade'

Charles Sparks testified in part:

"I remember them going out of the room together, and when he came back he said he had agreed with Mr. Maxwell and he was going ahead and make the trade".

It is very reasonable to suppose that the jury considered this evidence as corroborating the appellee. It shows that appellant and appellee made an agreement that was

satisfactory to them and then the contract was made. It was the especial province of the jury to weigh this testimony and that they have done. Nor can it reasonably be said that the verdict and judgment rest on the unsupported testimony of the appellee.

In this connection it is proper to consider the instruction about which complaint is made by appellant. The appellant offered but one instruction which was given by the court. It is an exact copy of an instruction copied on page 642 of the case of Union Traction Company vs. Yarus, 221 Ill. 641, in which case the instruction is sustained by the Supreme Court.

In the case of Lyons vs. Chicago City Ry. Co., 258 Ill. 75 on page 84 the Supreme Court had under consideration an instruction in part as follows: "The preponderance of evidence in a case is not, alone, determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which saide the preponderance of the evidence is, the jury should take into consideration, so far as shown by the evidence, the opportunities of the several witnesses for seeing or knowing the things about which they testify". The Supreme Court after discussing the above language say. "We do not consider the giving of this instruction on this record was reversible error".

Appellant cites the case of Lyon vs. Ryerson and Sons 242 Ill.409 as sustaining his position. On page 417 the supreme court call attention to the fact that the instruction omitted the element of numbers in telling the jury what should be considered in determining the weight of the evidence.

If the instruction given on behalf of the appellee was the only instruction bearing on the elements necessary to be considered a different question would be presented but

satisfactory to him and that the authors was such. If was the opening pretrial at the jury in trial. If testimony and that they have been. But was it necessarily to ask that the evidence and judgment jury in the unsupported testimony of the appellee.

In this proceeding it is proper to consider the instructions which complaint is made by appellant. The appellant objected the instructions which was given by the court. It is an error of an instruction cannot be upon did of the case of Union Insurance Company vs. Yates, 88 Ill. 421, in which case the instruction is reversed by the supreme court.

In the case of Lyon vs. Chicago City Ry. Co., 168 Ill. 73 on page 84 the supreme court had under consideration an instruction in part as follows: "The preponderance of evidence in a case is not, alone, determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration, as far as shown by the evidence, the opportunities of the several witnesses for seeing or hearing the things about which they testify".

The supreme Court after discussing the above instruction say, "We do not consider the giving of this instruction an like remark was reversible error".

Appellant cites the case of Lyon vs. Lyonns and Sons 201 Ill.418 as supporting his position. On page 427 the supreme court said attention is the fact that the instruction contains the element of caution in telling the jury that should be interested in determining the weight of the evidence.

If the instruction given on behalf of the appellee was the only instruction taking as the general instruction it is considered a fitting question could be raised but

at the request of the appellant the court gave to the jury appellant's instruction number 5 which expressly tells the jury, "The element of numbers should be considered with all the other elements already herein suggested, for whatever in the judgment of the jury that element is worth, and the evidence of the smaller number can not be taken by the jury in preponderance to that of the larger number unless the jury can say on their oaths that it is more reasonable, more truthful, more disinterested and more credible".

Considering these two instructions it is clear the jury could not have been misled by the instruction given for the appellee.

It is argued that under the contract of October 10, 1914 Appellant and appellee were partners. That the agreement was a partnership agreement. This is also urged as an objection to the admission of certain evidence on behalf of appellee. The second paragraph of that agreement is:

"The parties of the first part have agreed to purchase from the parties of the second part this entire contract of ten thousand horses, and also to purchase all horses that are furnished to the British Government by the first parties et

The third paragraph of that agreement provides for the keeping of an accurate expense account and the amounts the horses bring and the net profit or loss is to be ~~equally~~ equally divided between the parties to the contract and further provides, "Should there be a net profit from the sale of these horses under this agreement, then the parties of the first part are to give an additional one tenth of their profit to the parties of the second part"

It is then provided that the first party pay the second parties $175.00 per head for French horses that pass inspection. $165.00 to be paid when the horses were accepted

and branded and ten dollars per head more to be paid when the contract was completed. Likewise provision was made that the first party should pay the second party $175.00 to $210.00 for all horses that would pass British inspection. The full price of all British horses to be paid when these horses were inspected and branded.

This was a contract for the purchase of certain horses by the appellant. The prices to be paid were set forth in the agreement and also the time of payment. It is true a provision in that contract is that the net profit or loss is to be divided equally between the parties but that of itself would not make a partnership.

It is argued by counsel for appellant that the judgment is excessive. It may be remarked that the total amount of moneys received by appellant and the amount of all profits were within his knowledge and not in possession of appellee nor in his power to produce. The appelled was not in possession of these facts. He had to supply this proof as best he could.

It is in proof that under the contract of October 10, 1914 546 horses were furnished appellant and there is evidence tending to show that the profits were $13,244.92. It was contended that appellee's part of this profit amounted to $1324.48.

Under the contract entered into October 20, 1914 various witnesses estimate the profit on each horse all the way from $5.00 to $30.00 per head. As to the number of horses furnished it is estimated ashigh as high as 29,343. It is true this is an estimate but the actual figures should have been in possession of the appellant and he did not offer them at the trial. With these figures the jury assessed appellee's damages at $13000.00.

was treated and ton delivery per head were to be paid when the contract was completed. Clearing prices were made that the first party should pay the second party $175.00 to fill, or all horses that would pass British inspection. The full price of all British horses to be paid when horses were inspected and branded.

This was a contract for the purchase of certain horses by the appellant. The prices to be paid were set forth in the agreement and also the time of payment. It is true a provision in that contract is that the not payment or less is to be divided equally between the parties but that of itself would not make a partnership.

It is argued by counsel for appellant that the judgment is erroneous. It may be remarked that the total amount of money received by appellant and the amount of all profits were within our knowledge and not in possession of appellee nor in his power to produce. The appellee was not in possession of these facts. He had to supply this proof as best he could.

It is in proof that under the contract of October 15, 1918 the horses were furnished appellant and there is evidence tending to show that the profit to were $14,344.25. It was contended that appellee's part of this profit amounted to $1224.42.

Under the contract entered into October 5, 1918 parties of thereby estimate the profit on each horse at the sum $20.00 to $25.00 a head. As to the number of horses furnished it is estimated actually to be 57,142. It is true this is an estimate but the actual figures should have been in possession of the appellant and is not a fair item of the trial. With these figures the jury assessed appellee's damages at $1000.00.

Complaint is made of certain rulings of the court in regard to the evidence but an examination shows no reversible error in that regard.

The judgment of the circuit court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* Feb *A. D. 191*9.

Clerk of the Appellate Court

PINION

(611a)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

214 I.A. 658

Nellie Boyd,
Defendant in Error

No. 17
MARCH TERM. 1919.

vs.

Everett E. Jett,
Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

City COURT

East St.Louis ~~COUNTY~~

TRIAL JUDGE

HON. W. M. VANDEVENTER

Term No. 17. In the Appellate Court Agenda No. 9

of Illinois, Fourth District.

March Term, A. D. 1919.

Nellie Boyd, Defendant in error	
vs.	Error to the City Court of East St. Louis.
Everett E. Jett, Plaintiff in error	

Eagleton, J.

Plaintiff in error, Everett E. Jett, seeks to reverse a judgment for $350.00 in favor of defendant in error, Nellie Boyd.

On September 14, 1917 and for some time prior thereto plaintiff in error under the name of Eagist-Jett Commission Company carried on a commission business at No. 223 North Seventh Street, East St. Louis. In this business he handled butter, eggs, poultry etc. Seventh Street at that point was paved and the place of business of plaintiff in error was on the west side of the street. Immediately in front of said place of business was a granitoid sidewalk which extended to the south line of said place of business and north to the north line of the place of business adjoining on the north. The sidewalk was some twelve feet wide.

The defendant in error resided north of the place of business of the plaintiff in error. Between the residence of the Defendant in error and the granitoid sidewalk was a walk made of cinders.

On September 14, 1917 plaintiff in error had some chicken coops on the sidewalk in front of his place of business. The plaintiff in error testified: "There might have

Case No. 17. In the Appellate Court Agenda No. 9
of Illinois, Fourth District.
Spring Term, A. D. 1930.

Hallie Hope,
Defendant in error

vs.

Charles L. Pell,
Plaintiff in error

Error to the City Court of
Mount Ov, Illinois.

Mr. Justice, J.

PLAINTIFF in error, December 2, 1927, made his promissory note payable for $500.00 in favor of defendant in error, Hallie Hope.

On September 14, 1927 and for some time prior thereto, the plaintiff in error under the name of Pelgrim-Pell Construction Company entered on a construction business at No. 102 South Berwick Street, Mount Ov, Illinois. In this business he handled motors, engs, pumps etc. Present Street at that point was paved and the place of business of plaintiff in error was on the west side of the street. Immediately in front of said place of business was a granolitic sidewalk which extended to the south line of said place of business and north to the north line of the place of business adjoining on the north. The sidewalk was some twelve feet wide.

The defendant in error resided north of the place of business of the plaintiff in error. Between the residence of the defendant in error and the granolitic sidewalk was a well made of bricks.

On September 14, 1927 plaintiff in error had some fuel gasoline stored on the sidewalk in front of his place of business. The plaintiff in error testified: "There might have

been 15 or 20 coops piled up higher than your head and then there were other coops setting there also." A Ford chassis belonging to the plaintiff in error was setting on the edge of the sidewalk or in the street and extending over the sidewalk. On that day the defendant in error while passing along the granitoid walk in front of plaintiff in error's place of business stumbled and falling fractured her right wrist and sprained her left wrist. She also suffered some other bruises.

Plaintiff in error urges that the verdict and judgment cannot stand because not supported by the weight of evidence. There is no question as to the admission or rejection of evidence nor as to the instructions.

It is urged that the defendant in error is guilty of negligence and that the plaintiff in error was not guilty of negligence but that he was acting within his rights when he had the coops placed on the sidewalk.

The defendant testified about the accident as follows: "There is a granitoid walk in front of his (Jett's) place. I started to go to the butcher shop and there was an automobile that Mr. Jett had out on the sidewalk and it looked like a new one as far as I could see, I was walking directly in the middle of the walk - I was getting out of the way of the automobile. I didn't see the coop and I ran into it. At the time I started to go by the automobile it attracted my attention and the sun was shining in my face and I was watching the automobile; and I thought I would get out of the way and go on this side of it and I ran into the coop .....He had the coop completely across the walk there and I ~~xx~~ ran into it".

Plaintiff in error testified in part:

"I ran out and saw Mrs. Boyd about 1:30 or 2:00

o'clock in the afternoon. It was a bright clear day. There was a truck setting on the sidewalk, and a pile of chicken coops..... There was no space on the sidewalk between the chassis and coops on which one could pass between the automobile and the curb or street .....There might have been six inches between them (the coops) and the truck..... I have conducted my business there for two years and I use that sidewalk, and the coops were there only temporarily and they do not set there after night." On cross examination he said: "I used the the sidewalk in loading and unloading and some times I have a great many things on the sidewalk and at other times not so much".

Other witnesses testified in substance as above as to the use of the walk by plaintiff in error.

It is also urged that the defendant in error was required to use her eyesight. In this connection plaintiff in error cites the case of Village of Kewanee vs Depew, 80 Ill. 119.

That case sustains the position of plaintiff in error but the rule is not inflexible. In that case the Supreme Court says: "But a person, in full possession of his faculties passing over a sidewalk, in daylight, with no crowd to justle or disturb him, no intervening obstacle to obscure approaching danger, and suddenly occurring cause to distract his attention, is under obligation to use his eyes to direct his foot steps."

It is clear from the evidence that the defendant in error was injured because of obstructions placed on the sidewalk by the plaintiff in error. The reason ~~xx~~ the defendant in error failed to see the coops, as she stated it, was because she was keeping out of the way of automobile owned by the plaintiff in error. If the failure of the defendant in

error to see the coops belonging to the plaintiff in error was because the plaintiff in error had another obstruction that detracted the attention of the defendant in error the plaintiff in error is liable. This question was submitted to the jury and that issue found against appellant. No reason appears why their finding should be set aside.

There being no reversible error in the record the judgment of the City Court of East St. Louis is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*7.

C. C. Johnson

Clerk of the Appellate Court

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Leo J. Scherrer, et al.,
Plaintiffs in Error

No. 29
MARCH TERM, 1919.

vs.

Erber Amusement Co. et al.,
Defendants in Error

214 I.A. 658

ERROR TO
~~APPEAL FROM~~

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 29. In the Appellate Court Agenda No.18.

of Illinois, Fourth District.

March Term, A. D. 1919.

Blanche Dare, vs. Erber Amusement Company, Sadie Erber, Joseph Erber, Harry Carpenter, Leo J. Scherrer and Philip Cohn.	Bill for Accounting, Receiver, Relief, etc.
Leo J. Scherrer, Plaintiff in Error. vs. Erber Amusement Company, Blanche Dare, Sadie Erber, Joseph Erber, Philip Cohn, Fred W. Ziegenhein, A. J. Eulsen, A. J. Eulsen, Trustee, and Harry Carpenter, Defendants in Error.	Cross-bill for Accounting, Relief and Receiver, Etc.
F.W.Haberman, Trustee, Plaintiff in Error. vs. Leo J. Scherrer, Blanche Dare, Erber Amusement Company, Sadie Erber, Joseph Erber, Philip Cohn, Defendants in Error.	Intervening Petition.

Eagleton, J.

The Erber Amusement Company was incorporated, under the laws of Illinois, November 4, 1912, for a term of ninety nine years. The capital stock was $2000, issued in forty shares at $50 each. The object of the corporation was to conduct amusements etc.

The capital stock was issued as follows:

Sadie Erber	21 shares	$1050.
B. Dare	18 "	900.
Harry Carpenter	1 "	50.

B. Dare is Blanch Dare and sixteen of the eighteen shares of stock issued in her name, at the time of the issue

Term No. 29. In the Appellate Court Opinion No.14.

of Illinois, Fourth District.

March Term, A. D. 1932.

Lizzie Dare,	
vs.	Writ in Assumpsit,
Great Amusement Company, Dodge Inter, Crazy Inter, Crazy Carpenter, Leo J. Shearer and Philip Cohn.	Error, Appellant, Bailed, 20M.

Leo J. Shearer,

Plaintiff in Error.

vs.

Great Amusement Company, Lizzie Dare, Dodge Inter, Crazy Inter, Philip Cohn, Fred W. Stephenson, A. J. Quinn, L. J. Quinn, Trustee, and Harry Carpenter,	Error-Writ for Supersedeas, Dismiss not received, 20M.

Defendants in Error.

F.J.Stephenson, Trustee,

Plaintiff in Error.

vs.

Leo J. Shearer, Lizzie Dare, Great Amusement Company, Dodge Inter, Crazy Inter, Philip Cohn,	Interpleading Pleadings.

Defendant in Error.

Bailiff, J.

The Great Amusement Company was incorporated, under the laws of Illinois, November 4, 1921, for a term of twenty nine years. The capital stock was $2000, issued in forty shares at $50 each. The object of the corporation was to conduct amusements etc.

The original stock was issued as follows:

Lizzie Dare	32 shares	$1600.
A. Dare	12 "	600.
Harry Carpenter	1 "	50.

A. Dare is Lizzie Dare and plaintiff of the Supreme Court of which issues in her name, at the time of the issue

thereof belonged to Leo J. Scherrer. The other two shares issued to Blanch Dare were her property.

At the first meeting of the stockholders, of said corporation, Sadie Erber, Harry Carpenter and Blanch Dare were elected directors.

At the first meeting of the board of directors Sadie Erber was chosen president, Blanch Dare secretary and Joseph Erber general manager, and the salary of the general manager was fixed at $35 per week. The corporation commenced business at 219, Collinsville Avenue, East St.Louis, Illinois and has continued in business since then.

In the summer or fall of 1913, Scherrer became indebted to one A. J. Nulsen in the sum of $900 and gave his note to Nulsen for that amount, payable on demand with interest at 6%. Scherrer also directed Blanch Dare to sign the blank assignment and power of attorney on the back of the certificate for said sixteen shares of stock and deliver said certificate to Nulsen, as collateral security for the payment of said note, which she did.

In March 1914, Scherrer borrowed $600 from Nulsen and gave him six notes of $100 each, payable on demand with interest at 6%. At that time it was verbally agreed, between Scherrer and Nulsen, that said sixteen shares of stock should stand as collateral security for the payment of said last mentioned notes also.

While these several notes were in Nulsen's hands Scherrer paid him four hundred dollars thereon, leaving a balance of nine hundred dollars and interest.

In October 1914 Nulsen sold the notes to Charles Troll and the sixteen shares of stock, as collateral security, passed into the hands of Troll.Thereafter Troll sold said notes to Fred W. Ziegenhein, and said shares of stock passed with

them to Zeigenhein. In December, 1914, Ziegenhein sold said shares of stock to Philip Cohn paying him $2500 and also the costs in a certain suit in the City Court of the City of East St. Louis, Illinois, amounting to $19.

On July 6, 1914 a meeting of the stockholders of said corporation was held and on the same day a meeting of the board of directors was held. At the meeting of the board of directors Sadie Erber was elected president, and Joseph Erber general manager of said corporation. At the meeting of the board of directors the salary of Joseph Erber, as general manager, was fixed at $100 per week, his salary, up to that time, had been $35 per week. After his salary was fixed at $100 per week Joseph Erber drew enough from the treasury of said corporation to make his salary $100 per month from January 1, 1914 to July 1, 1914.

March 6, 1915 Blanch Dare filed the original bill of complaint in this case. In that bill she set forth that she was the owner of two shares of the capital stock of said corporation and set forth the organization, issuance of stock, the first election of officers and adoption of by laws of said corporation as above set forth. She further charged that Sadie Erber and Joseph Erber, unlawfully intending to cheat and defraud the complainant wrongfully removed her as secretary and treasurer of said corporation and refused to allow her to inspect the books or to ascertain the earnings of said corporation, that there had been large earnings, and that Joseph Erber had misappropriated moneys belonging to said corporation and especially that he had drawn, as salary, money to which he was not entitled. In said bill Blanch Dare prayed an accounting to ascertain the amount received by the said Erbers, and to ascertain the amount due her on her two shares of stock, and that the Erbers be required to pay her

said amount, and that a receiver be appointed and proper provision made for protecting her interests and for general relief. To this bill the Arber Amusement Company, Sadie Arber, Joseph Arber, Harry Carpenter, Leo J. Scherrer and Philip Cohn were made defendants.

April 21, 1915 an answer, purporting to be the answer of all of said defendants was filed to said bill. This answer was disclaimed by said Leo J. Scherrer and a separate answer filed by him June 21, 1915.

In the answer, filed to said bill April 21, 1915, it was alleged that the sixteen shares of stock, issued in the name of B. Bare for Leo J. Scherrer, had been purchased by the defendant Philip Cohn and that he was the owner of the same. In said answer was also set forth general denials of the charge of mismanagement.

In his separate answer Leo J. Scherrer admitted the allegations in the original bill.

On June 21, 1915, Scherrer filed a cross bill and after various amendments Scherrer filed an amended cross bill in said cause. In this amended cross-bill were allegations, similar to those in the original bill, as to the organization, management of said business and of misconduct on the part of the Arbers.

In his amended cross-bill, Scherrer set forth said indebtedness to Bulsen and the giving of said shares of stock as collateral security therefor, the additional loan and notes therefor and the agreement that said shares of stock should stand as security for said additional loan. He also charged that said notes had been assigned to the persons above named, including Ziegenhein and Cohn, and that said shares of stock had passed to and had been held by each of said parties as collateral security for said notes. He fur-

ther charged that no steps had been taken, by either of said parties, to sell said shares of stock. It was further charged in said cross bill that Cohn had collected a large amount of money as dividends on said shares of stock the amount of which was to Scherrer unknown. The prayer in said cross bill was for an accounting in respect to the earnings of said corporation; that Cohn might be required to deliver up to him said shares of stock upon payment, by said Scherrer, of any balance that might be due on said notes after giving credit for all money Cohn had received as dividends on said shares of stock; that said shares of stock be decreed to belong to him the said Scherrer that the Erbers be required to pay into the treasury of said corporation any money appropriated to themselves and belonging to said corporation; that Cohn be decreed to pay to cross complainant, any money he had received as dividends on said shares of stock in excess of the amount due on said notes and a prayer for general relief. To this cross bill Blanch Dare, Erber Amusement Company, Sadie Erber, Joseph Erber, Philip Cohn and Fred Ziegenhein were made defendants.

Philip Cohn, Erber Amusement Company, Sadie Erber, Joseph Erber and Harry Carpenter, on February 13, 1916, filed a plea to a portion of said amended cross-bill and an answer to the remainder thereof.

On January 24, 1916 an amended plea was filed by the same defendants to the same portion of said amended cross bill.

In said amended plea it was alleged, that in a former suit in the City Court, of the City of East St.Louis, Illinois, filed May 5, 1914, wherein one Charles Troll was complainant and the said Leo J. Scherrer was a defendant, the said Scherrer filed his answer in said cause, in which said

answer the said Scherrer averred that sixteen shares of stock, being the same sixteen shares of stock in litigation in this cause, were assigned and delivered by him, in July 1913, to one A. J. Dulsen, for a valuable consideration, and that he was not then in possession, or control, of said shares of stock, and that prior to the purchase of said shares of stock, by the said Cohn from Ziegenhein said Cohn examined said answer and ascertained said answer to be true, and thereafter purchased said stock, by reason whereof said Scherrer was estopped from asserting any claim, right, title or interest in or to said shares of stock.

In the answer filed to said amended cross bill by Philip Cohn and others, January 13, 1916, was a denial of the charge in said cross bill that said Ziegenhein sold said notes to Cohn and delivered said sixteen shares of stock as collateral security, and it was alleged that Ziegenhein sold and delivered said shares of stock to Cohn for a valuable consideration, and denies that Philip Cohn is now, or has at any time, held said stock as security for the payment of said notes.

Plaintiff in error, F.W.Haberman, Trustee, filed an instrument, which is called an intervening petition, April 8, 1916, making Blanch Bare, Erber Amusement Company, Sadie Erber, Joseph Erber, Philip Cohn and Leo J. Scherrer defendants thereto.

In said petition it was alleged the said Leo J. Scherrer became indebted to the petitioner in the sum of $16800 and on October 17, 1914 gave his promissory note for said sum, payable on or before two years after date with interest and in said note provided said sixteen shares of stock should be collateral security for the payment of said note; that judgment had been taken on said note, for the

amount due thereon, and no part of said judgment had been paid.

It was further alleged in said petition, that Philip Cohn had had said sixteen shares of stock issued in his own name and that said Cohn claimed exclusive ownership thereof, but that the only interest Cohn had grew out of the facts set forth in said amended cross bill, and said petitioner claimed a lien on said shares of stock subject to the lien of the holder of said Nulsen notes.

The prayer to said petition was that the interests of Leo J. Scherrer, Blanch Baré, Philip Cohn and said petitioner, respectively, in said shares of stock, be determined; that Scherrer be decree to be the owner of said shares of stock; that Cohn be decreed to have no right, title or interest therein except to have sufficient money received by him as dividends applied to payment of said Nulsen notes, if the court found said notes to be a prior lien over the indebtedness due the petitioner; that the court decree said shares of stock as collateral security for the indebtedness due the petitioner; that a new certificate for said sixteen shares of stock be issued by the president and secretary of said company to the said Scherrer and that Cohn be required to deliver up said certificate held by him; and a prayer for general relief.

After this petition was filed it was ordered that the answers of the defendants, to the original bill, be extended to said intervening petition, and the complainant in the original bill and complainant in the cross bill each filed answers admitting the truth of the allegations of the intervening petition.

Replications were filed and by agreement a special master was appointed to report his findings of fact and conclusions of law applicable thereto.

Pursuant to said reference said special master commenced hearing the evidence in said cause beginning with the evidence offered by Blanch Dare in support of the original bill. After taking evidence for some time Blanch Dare made a settlement of her matters and no further evidence was taken with reference to her interests.

After hearing the evidence the special master made findings of facts and reported them, with his conclusions of law, to the court. To certain of these findings and to certain conclusions reached by said master, said Leo J. Scherrer and F. V. Haberman, Trustee, filed objections.

Said special master found as facts the following to which plaintiffs in error objected viz:

"That the conversation testified to by Cohn and Weber actually occurred and that Scherrer there said he had sold his stock to Nulsen, and that he understood Ziegenhein had it; that by reason of the statement made by him in that conversation, and in his answer in the City Court, Cohn had a right to believe and did believe, that Ziegenhein held the stock without restriction, and that Cohn became the bona fide owner for value without notice of the limitations of Ziegenhein's title".

The special master further made findings of fact as follows to which said Scherrer and Haberman, Trustee filed objections:

That from January 1, 1914 to July 1, 1914, plaintiff in error Leo J. Scherrer owned 32% of the capital stock in said corporation, and that of a sum of $1625 found by the master to have been wrongfully drawn from the Erber Amusement Company by the said Joseph Erber the said Scherrer was entitled to $520. The objection to this was that Scherrer in fact owned 45% of the stock of said corporation, during said

time, and was entitled to $650 of said money.

The special master recommended to the court that the following provisions should be made in the decree to which recommendation said Leo J. Scherrer and F. W. Haberman, Trustee, objected viz:

That a decree be rendered finding that said sixteen shares of stock were acquired by Philip Sohn as a bona fide purchaser without notice for a valuable consideration, and are now held and owned by the said Philip Sohn.

That Leo J. Scherrer is not entitled to an accounting against the defendants in the cross bill, except for the period from May, 1914 to December, 1914.

In addition to the objections to the findings of said special master the following objection was also filed by said Scherrer and Haberman, Trustee.

"Said Leo J. Scherrer objects to the said proposed report of the said special master, in that it fails to make any accounting or finding against the said Joseph Arber with respect to divers unlawful, unreasonable and unnecessary expenditures of money for personal expenses of the said Joseph Arber as shown by the evidence".

The plaintiff in error, F. W. Haberman, Trustee, filed objections to said report of the special master in the same form as those filed by the said Scherrer.

On a hearing before the special master all of the above objections were overruled except the objection that the said Scherrer was the owner of 45% of the capital stock of said corporation from January 1, 1914 to July 1, 1914, and that he was entitled to $650 of said $1625 instead of $520 which objection was sustained. The special master made a supplemental finding that Scherrer was entitled to 45% of said sum of $1625 or $650 and filed his original report, sup-

time, and was entitled to 1000 of such money.

The special master recommended to the court that the following provisions should be made in the decree to which representations had been J. Thurston and E. F. Jackson, Trustees, objected thus:

That a decree be rendered finding that all matters in issue had been adjusted by letting them as a bona fide purchaser without notice for a valuable consideration, and the bill was dismissed by the same finding then.

That the J. Thurston is not entitled to an accounting against the defendants in the other bill, except for the period from July, 1913 to December, 1918.

In addition to the objections to the findings of said special master the following objections were also filed by said Trustees and complainant, Trustee.

That the J. Thurston rights in the said partnership property of the said special master, in fact it fails to make any accounting or finding against the said Joseph Jones which ought to have been made, erroneous and unnecessary and prejudicial to rights in favor of the said Joseph Jones as shown by the evidence.

The judgment in 1914, F. J. Jackson, Trustee, filed objections to said report of the special master in the same form as those filed by the said Defendant.

On a hearing before the special master all of the above objections were overruled except the objection that the bill therein was the point of the original assignment of said partnership from January 1, 1914 to July 1, 1918, and that he was entitled to 1000 of said first payment of $2000 which objection was sustained. The master further made a supplemental finding that interest was entitled to 10% of said sum of $1000 on $2000 and filed his original report, ac-

plemental report and the objections thereto.

On a hearing on the report and supplemental report of the special master, and the objections thereto, which were ordered by the court to stand as exceptions, the Court found said special master's report of finding of facts and conclusions of law, as said original report had been modified by said supplemental report, to be correct and the same was confirmed, and a decree entered accordingly and judgment was rendered against Leo J. Scherrer for two thirds of the costs and against the Erber Amusement Company for one third thereof.

From this decree Leo J. Scherrer and L. W. Haberman have sued out this writ of error.

The errors complained of may be considered under four heads:

First.- That the trial court erred in decreeing that Cohn was the owner of the sixteen shares of stock in question and in failing to decree Cohn to account for the money he received on said shares of stock.

Second- That a proper accounting was not had in that the court did not state an amount due from Siegenhein for profits on the sale of said shares of stock.

Third.- The amount decreed against Joseph Erber was not correct.

Fourth.- The court erred in decreeing Leo J. Scherrer to pay two thirds of the costs.

When Scherrer gave the first notes to Sulsen he caused Blanch Dare to sign the blank assignment and power of attorney on the back of the certificate of stock and delivered it to Sulsen. The assignment and power of attorney on the back of said certificate of stock as the same was signed and delivered to Sulsen was as follows:

"For value received, I hereby sell, assign and transfer unto _____ sixteen shares of capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint _____ to transfer said stock on the books of the within named corporation with full power of substitution in the premises.

Dated January 16, 1913.
In presence of E. Dare".

_____

In telling how he acquired said sixteen shares of stock Cohn testified:

"I learned that there were shares of stock of the Erber Amusement Company for sale in December 1914; Erber told me about the stock. I next talked to Fred Ziegenhein about the same time. I learned he had sixteen shares of stock. I learned from you (Mr. Webb) that an accounting was pending.... Weber and myself went to the City Hall in East St.Louis got the files in the Troll v. Scherrer case.....Mr. Weber read the answer to me; we went and found Mr. Scherrer in front of the Coloma Building; I said Mr. Scherrer.....I have been contemplating buying the stock of Mr. Ziegenhein in the Erber Amusement Company and I notice an answer filed in the case of Troll against you, and others that you sold your stock. He said: 'Yes I sold my stock to Mr. Dulgen: But, he said, I control two shares'; he said, 'He understood Mr. Ziegenhein owned the stock'.....Mr. Weber was standing right with us during the conversation. I don't think he talked to Scherrer. He said he sold his stock to Mr. Dulgen and that Ziegenhein now owned it. The second or third day after that I purchased the stock. I never got any note from Ziegenhein and know nothing about them. I paid for this certificate $250 and $19 court costs in the suit of Troll vs Scherrer.

Cohn further testified that when he got the certificate he took it and exchanged it for a new certificate for the same amount of shares. He also testified about other conversations with Scherrer in which the shares of stock were talked about but in none of them did Scherrer claim to own the shares after they came to Cohn's hands.

R. W. Weber testified in substance the same as Cohn testified about the conversation in front of the Coloma Building.

In the answer filed by Scherrer in the City Court in the Troll case he set forth:

"The defendant admits that said two shares of stock owned by E. Dare are still owned by her, but avers that the other sixteen shares of stock above mentioned, formerly in the name of said E. Dare, which belonged to this defendant, were assigned and delivered in July, A. D. 1913, to one A.J. Hulsen, of the City of St. Louis, Missouri, for a valuable consideration paid by the said Hulsen to this defendant..... Defendant says that the sixteen shares of stock assigned by this defendant to A. J. Hulsen, for a valuable consideration are not now in the possession of this defendant".

E. W. Ziegenhein testified to a certain conversation in which he said Scherrer told him he had disposed of his shares of stock in the Company to Mr. Hulsen.

C. H. Ward testified: "We were discussing Miss Dare's case; Scherrer asked me what Cohn would take for his shares, he suggested I find out what he would take as a bonus above what he received as profits for his share of stock".

Scherrer denies the above conversation with Ziegenhein and denied the conversation stated by Cohn and Weber as the same was given by them. He said his conversation with Ward was: "That he would be glad to pay Mr. Cohn what he had

John Stirner testified that when he got the pro-
hibition he took it and exchanged it for a pro-Germany
in the [illegible] of Albany. He also testified about other
conversations with Warren at which the shares of stock were
talked about but in none of them did Warren claim to own
the shares after they came to Crown's hands.

J. S. Baker testified to substantiate the same as
Duke testified about the conversation in front of the Colonial
building.

In the answer filed by Warren in the City Court
on the 7th it was he set forth:

"The individual defendant will the shares of stock
which [illegible] Warren was not, but avers that the
other alleged shares of stock were delivered, transfer in
the name of said J. Doe, which belonged to the defendant,
were received and delivered in July, [illegible], in the N.Y.
Edison. At the City of N. Jersey, Discovery, for a valuable
consideration paid by the said Warren to this defendant.....
Further says that the alleged shares of stock mentioned by
the plaintiff in J. Doe, for a valuable consideration
did not rest in the possession of this defendant".

J. S. Algeworth testified to a certain conversa-
tion that he held in said Director rooms in the Kingwood
of his office at stock in the Company in Albany.

J. S. Hall testified: "We were discussing Elm
Park's cost; Director asked me what Colon would take for his
shares, he suggested I that not what he would take as a bonus
also that he resented as profits for his share of stock".

Federal Judge Lia there conversation with Hagen-
ian not fulfill the conversation stated by John and Peter as
the same was given by them. He said his conversation with
Hand was: "They do not want to pay us, I did what he had

in, and a bonus from his expenses and trouble, if he would surrender the stock he claimed".

In this connection it is proper to consider the effect of the action of Scherrer in placing the shares of stock as collateral security with the blank power of attorney and assignment on the back thereof signed.

Pomeroy in discussing this question in his work on Equity has this to say:

"The owner of certain kinds or things in action, not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character in fact, may assign or part with them for a special purpose, and at the same time may clothe the assignee or person to whom they have been delivered with such apparent indicia of title and instruments of complete ownership over them, and power to dispose of them, as to estop himself from setting up against a second assignee, to which the securities have been transferred without notice and for value, the fact that the title of the first assignee or holder was not perfect and absolute. The ordinary and most important application of this rule is confined to the customary mode of dealing with certificates of stock. If the owner of stock certificates assigns them as collateral security, or pledges them, or puts them into the hands of another for any purpose, and accompanies the delivery by blank assignment and power of attorney to transfer the same in usual form, signed by himself, and the assignee or pledgee wrongfully transfers them to an innocent purchaser for value in the regular course of business, such original owner is estopped from asserting, as against the purchaser in good faith, his own higher title and the want of actual title and authority in his own immediate assignee or bailee". Pomeroy's Equity Jurisprudence (3rd Ed) Sec. 710, Pages 1242-1243.

is, and a boon from his enemies and tyrants, it is until extracted the above be disdained".

In this connection it is proper to consider the effect of the action of Hooker in stating the above of rank as original security with the black power of attorney the assignment on the back thereof signed.

Henry is discussing this question in his work on Legal law this to say:

"The power of certain state or things in nation, not legislatively supplicate, not which, in the course of business reviews, have required a semi-particular conferred in fact, any action or part with loan for a special purpose, and at the same time any claims the assignee of person in whom they have been delivered with such equivocal notice of life and instruments of complete ownership over time, and power to dispose of them, so to bring himself from suing up against a second creditor, to which the securities have been transferred without notice and for value, the fact that the title of the first assignee is subject to his partner and associate: The security and most important evidences of this fact is evident in the mortgage made of business with particulars of state. If the owner of stock participates assigns them as collateral security, or pledgee loan, to pay them into the hands of another for any purpose, and assignee has the security of stock ownership and power of attorney to transfer the same in usual form, signed or signed, and the pledgee is always wrongfully transfer them to an innocent purchaser for value in the regular course of business, with original owner is assigned from something, so against the wrongdoer in such instance. His are higher title and the work of actual title and authority in his to transfer assignee of failure". Henry's Equity Jurisprudence (3rd Ed. Vol. 2, Page 1041).

Further discussing this subject the same author says:

"If, in addition to his equitable interest conferred by assignment, he has also obtained the legal title,.....,then the doctrine of purchase for a valuable consideration and without notice may apply so as to protect him against all such outstanding equities..... .

Pomeroy's Equity Jurisprudence (3rd Ed) Sec.712, page 1251.

The Supreme Court of Illinois in passing on a question involving the signing of a blank power of attorney on the back of a Receiver's Certificate and delivering such certificate to a third person says:

"By signing the transfer and power of attorney in blank, from whatever motive, and delivering the certificate so endorsed to Whipple & Co., the appellee clothed them with the customary indicia of absolute ownership. He had done all that was necessary for him to do; all that was possible for him to do to indicate to all persons interested that they owned the certificate. With the transfer on the books of the company had nothing to do." McCarty v Crawford 238 Ill.38.

In the case of Otis Admr. v Skinner 105 Ill.436. The Supreme Court in considering a case wherein one Sheridan Wait, in his lifetime, had loaned certain shares of stock to one Chauncey F. Bowen. Written on the back of each certificate was a blank assignment and power of attorney. After signing his name below the blank assignment and power of attorney he delivered them to one Chauncey T. Bowen. Afterwards Chauncey T. Bowen became surety on the note of one James T. Bowen and placed said shares of stock as collateral security for the payment of said note. The Supreme Court in discussing the effect of the act of the owner in so assigning said shares of stock says:

"As has been seen, the certificates of stock were placed in the hands of Bowen by the intestate in such a condition they could readily be sold or hypothecated by him, and if his assignees made an improper use of them, the assignor, if living, could get no relief against that which he deliberately authorized to be done, if it would affect, injuriously an innocent purchaser for value..... The principle is, that when one of two or more persons must suffer loss, upon him whose conduct made it possible for the loss to occur should the consequences ultimately rest". Equitable estopple is defined as follows:

"Equitable estopple is the effect of the voluntary conduct of the party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps otherwise have existed either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been thereby led to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy". Pomeroy's Equity Jurisprudence (3rd Ed.) Sec.805 pages 1421-1422.

It is clear that when Scherrer caused the assignment and power of attorney to be signed in blank by E. Dare and then turned the same over to Sulsen all persons dealing with the shares of stock thereafter, who acted in good faith, without notice and for a valuable consideration, would take the stock free from all claims or demands of every kind, of the said Scherrer. The same rule must apply to Haberman, Trustee, who as a subsequent assignee of Scherrer can have no greater rights than Scherrer.

Thus it appears that not only did Scherrer, by causing the assignment andpower of attorney, to be signed in blank

blank and delivering the shares of stock so endorsed to Nulsen, estop himself from claiming said shares of stock against an innocent purchaser for value, without notice, but his conduct thereafter adds strength to the position that he must not be permitted to deny that he intended to lead all persons to believe that he had sold the stock in question. Under the rules above announced he must be held to have estopped himself from asserting any title as against Cohn who appears to have been an innocent purchaser for value.

From what has been said it follows that the court did not err in decreeing Cohn to be the owner of the shares of stock in question and, likewise, the court did not err in not requiring Cohn to account for the profits of the shares of stock after he became the owner thereof.

Counsel for plaintiffs in error argue, that the only defense set up by Cohn, to the claim of Scherrer in his cross bill, is that the shares of stock had been sold as collateral security prior to the time he purchased them.

Inasmuch as there was no proof that the shares had been so sold, it is argued that the court erred in decreeing him to be the owner.

Counsel for plaintiffs in error cite many authorities as to the proper method of disposing of collateral security to satisfy the debt it is given to secure. As Scherrer is estopped from denying the title of Cohn it is not necessary to discuss these authorities.

Cohn was in possession of the sharesof stock under claim of ownership. Scherrer filed a cross bill claiming he was the owner subject only to the lien thereon for whatever balance might be due on the Nulsen notes. To this cross bill Cohn filed a plea stating that after certain investigation he had purchased the stock. In said plea was set forth the steps

leading up to the purchase and that said Scherrer should be estopped from denying his title.

It is claimed that because the court found that Ziegenhein was not an innocent purchaser he should have been required to account for the moneys he received from the sale of said shares of stock. It is true that under proper pleadings such accounting would be required. Ziegenhein was a defendant to the cross bill. There is a prayer for general relief. This would be sufficient to warrant the court in granting any relief warranted by the allegations of the bill and the proofs in the case.

In Walker v. Converse 148 Ill.622. The Supreme Court held: "As the bill contains a general prayer for relief, it must be regarded, under the rule now well recognized in this State, as sufficient to support any decree warranted by the facts alleged in the bill".

This rule has been frequently announced by the Supreme Court. Among the cases so holding are Rankin v. Rankin 216 Ill.141 and Thielde v. Bush, 189 Ill.544.

In the case last mentioned after quoting the holding made in the case of Walker v. Converse, supra, the Supreme Court say: "The rule is where a bill contains a prayer.....for general relief the complainant may,....., under the general prayer, be granted such relief as he may be found entitled to have under the allegations of fact made in the bill, and the proof in support thereof".

The qualification that the complainant may be granted such relief, "as he may be found entitled to have, under the allegations of fact made in the bill", is a limitation of controlling importance.

The cross bill contained no allegation that the defendant Ziegenhein had sold the shares of stock nor that he had received any dividends or profits from said shares of

stock. There is no charge that Ziegenhein had received any money from any source whatever that belonged to Scherrer.

In the case of Fuller v. Davis & Son, 184 Ill.505, the Supreme Court stated the converse of the above proposition as follows:

"Manifestly the decree of the circuit court cannot be sustained. It is clearly beyond the scope of the bill, and the prayer for relief. Neither is it supported by the evidence- The only attempt to justify the finding and decree is under the general prayer. But a general prayer for relief will only sustain a decree when the facts alleged justify such decree- A decree can never rest upon the prayer alone, whether it be for specific or general relief. There are no sufficient allegations in this bill for an accounting".

From these authorities it is plain that, where a bill contains a prayer for general relief and an allegation of facts warranting the granting of relief the complainant may, under the prayer for general relief, have such relief as the facts alleged and proved warrants.

Another reason why the decree so far as an accounting by Ziegenhein is concerned should not be disturbed, is that the objections filed by the plaintiffs in error did not raise any question about the failure of the special master to state an account between him and the plaintiffs in error.

As to the accounting so far as the Arber Amusement Company is concerned the book-keeper gave data showing Scherrer had received all the profits of the sixteen shares of stock up to the time said stock passed to Cohn.

Joseph Arbers account was all presented to the special master and his findings confirmed by the court. An examination of the record does not show such errors in said accounting as would warrant the court in setting aside the

decree of the circuit court.

The last objection urged to the decree is that the court erred in decreeing Scherrer to pay two thirds of the costs. The rule that the Chancellor has the right to apportion costs is so well recognized that it is not necessary to cite authorities in support thereof. If the Chancellor should abuse his discretion in the apportionment of costs a court of review would correct the error but from the facts in this case it appears that the Chancellor made an equitable division of the costs when he directed Scherrer to pay two thirds thereof. A very large portion of the costs were incurred in the attack of Scherrer on Cohn as to the shares of stock held by Cohn and this issue was decided against Scherrer.

Finding no reversible error in the record the decree of the Circuit Court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*7.

C. C. Johnson

Clerk of the Appellate Court

NOINI

(613a)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

214 I.A. 658

The People of the State of Illinois,
Defendant in Error

No. 31
MARCH TERM. 1919.

vs.

Joe Kuca,
Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

County COURT

Franklin COUNTY

TRIAL JUDGE

HON. THOMAS J. MYER

Term No. 31. March Term, A. D. 1919. Agenda No.12

The People of the State of Illinois, Defendant in Error	)	
vs	)	Error to the County Court of Franklin County, Illinois.
Joe Kuca, Plaintiff in Error.	)	

Error to the County Court of Franklin county; the Hon. Thomas J. Myers, Judge, presiding. Heard in this court at the ~~xxxxxxxx~~ March Term 1919. Affirmed. Opinion filed .....1919.

Eagleton, J.

Plaintiff in error was found guilty by a jury in the County Court of Franklin County under an indictment charging him with selling intoxicating liquor in anti-saloon territory. There were six counts in the indictment and he was found guilty under each count. After motion for new trial had been overruled the court rendered judgment on the verdict that plaintiff in error be fined fifty dollars and imprisoned in the County jail of Franklin County ten days under each count. The terms of imprisonment were to be consecutive and after the first each to immediately follow the preceding. Judgment was also rendered against plaintiff in error for costs and it was ordered that after the periods of commitment in the county jail if the fine and costs were not paid, plaintiff in error should work said fine and costs on the public streets of the City of Benton.

Complaint is made of the rulings of the court in limiting cross examination of one Eddie Abrams called as a witness for the prosecution.

Abrams testified that on the 4th day of May 1918 he purchased five cases of beer and two quarts of whisky of the

Term ex. 22. Seven Days, A. D. 1922. Upsonia Jurid.

The People of the State of Illinois, Defendant in Error vs. The Illinois Central Railroad Company, Plaintiff in Error.	Error to the County Court of Franklin County, Illinois.

Error to the County Court of Franklin County; the Hon. Thomas J. Byers, Judge, presiding. Heard in this court at the September Term 1922. Affirmed. Opinion filed _____1922.

Daniel-ex, J.

Plaintiff in error was found guilty of a jury in the County Court of Franklin County under an information charging him with selling intoxicating liquor in anti-saloon territory. There was no counts in the indictment and he was found guilty under each count. After motion for new trial had been overruled the court pronounced judgment on the verdict that plaintiff in error be fined fifty dollars and imprisoned in the county jail of Franklin County for ninety days under each count. The terms of imprisonment were to be consecutive and after the first ninety days he immediately follow the prescribed. Defendant was also prohibited against plaintiff in error for costs and it was ordered that after the expiration of sentence in the county jail if the fine and costs were not paid, plaintiff in error should work with fine and costs on the public highways of the city of Benton.

Complaint is made of the validity of the court in imposing cross sentences of one ninety days where called on a witness for the prosecution.

Counsel insisted that on the 4th day of Jan 1922 he physically fire cause of that not the people of Illinois of the

plaintiff in error. On cross examination he was asked: "What did you want with that amount of beer and whisky." To this question the court sustained objection. This question was reasonably within the proper limits of cross examination and should have been allowed, but its refusal does not constitute reversible error.

It is next urged that the court erred in admitting a certificate of the internal revenue collector showing the payment by J. E. Kuca of the special tax as a retail liquor dealer from July 1, 1917 to June 30, 1918.

On the trial it was objected that the certificate was secondary evidence and no notice had been served on the plaintiff in error to produce the original.

Section 17 of the "Local Option" law provides:

"The issuance of an internal revenue special tax stamp or receipt by the United States to any person as a whole sale or retail dealer in liquors or in malt liquors at any place within territory which at the time of the issuance thereof in anti saloon territory, shall be prima facie evidence of the sale of intoxicating liquors by such person at such place etc".

It is not disputed that the place where the plaintiff in error is charged with selling intoxicating liquors was at the timeof such alleged sales in anti-saloon territory.

This question has been passed on by the Appellate Court for the Second District in the case of People vs. Peck, 203 Ill.App.504, in which case it was held that "A certified copy of a record of the internal revenue collector's office for the district within which intoxicating liquors were charged to have been sold, showing the issuance of a special stamp or license to carry on the business of retail liquor

dealer at a certain place for a certain period, held to be competent evidence without proof that it was posted in such place".

The court did not err in admitting the certificate in evidence.

It is also urged that the verdict is not supported by that degree of evidence required in a criminal case.

Hannah Maitland was called as a witness for the prosecution and testified that she had purchased whisky by the quart from the plaintiff in error as many as ten times within eighteen months prior to May 22 1918.

On cross examination this witness was asked if she had had trouble with Huca. She stated she had trouble with Huca's woman and that Huca had her arrested at one time. She denied being mad at Huca.

It is argued that because of the trouble between this witness and the plaintiff in error that there is no proof of sales of liquor. It was proper to make inquiry as to the feeling the witness had toward the plaintiff in error but it cannot be said to go to the extent of impeaching her. It might tend to discredit her testimony but not entirely destroy it.

There is nothing in the record that tends to overcome the testimony of this witness and standing as it does it would warrant the verdict and judgment of the court.

Finding no reversible error in the record the judgment of the County Court of Franklin County is affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*7.

Clerk of the Appellate Court

NOINI

614a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.
(Appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Reh'g

Mary E. Jones,
Appellant

~~ERROR TO~~
APPEAL FROM

214 I.A. 659

No. 52
MARCH TERM. 1919.

vs.

Clyde E. Hooker,
Appellee

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

HON. W. B. WRIGHT

Term No. 52. In the Appellate Court, Agenda No.33.

Fourth District.

March Term, A. D. 1919.

Mary E. Jones, Appellant. vs. Clyde E. Hooker, Appellee.	)	Appeal from the Circuit Court of Fayette County.

Per Curiam

This case was previously before this court at the March Term, 1918, and an opinion was filed therein, affirming the judgment of the court below, on November 1, 1918, which was prepared by the late Justice J. C. McBride. Subsequently a rehearing was granted, and the case has again come before the court at the present time and has been reargued by counsel.

Upon full consideration of the cause by the court, we have again arrived at the conclusion that the judgment of the court below should be affirmed, and as embodying our reasons for that decision the court as now constituted has adopted the opinion heretofore filed in the case, which is as follows:

"The appellant instituted this suit to recover from appellee $350.00 that she had paid to him under the following circumstances; on July 11, 1913, the appellee was an agent of the Central Insurance Company of Illinois, and induced Fred Walter Jones a son of appellant to take out a policy of insurance upon his life, in which policy the appellant was made the beneficiary. The policy was issued on the 18th day of July 1913. Two annual premiums were paid

Term No. 80. In the Privileges Court, Appeals pro.28.
Fourth District.
Lake Tahoe, c. 2. 1919.

Sitz v. Jones,
Appellant.
vs.
Elgin v. Weber,
Appellee.

Appeal from the Circuit Court of Superior County.

The opinion.

This case was previously before this court at the March Term, 1918, and an opinion was filed therein, affirming the judgment of the court below, on December 3, 1918, which was reversed by the late Justice J. E. Jeffries. Subsequently a rehearing was granted, and the case has again come before the court at the present time and has been argued by counsel.

Upon full reconsideration of the cause by the court, we have again arrived at the conclusion that the judgment of the court below should be affirmed, but as additional and reasons for that decision the court as now constituted has adopted the opinion hereinafter filed in the case, which is as follows:

The appellant instituted this suit to recover from appellee $180.00 that she had paid to the under the mistaken assumption; on July 11, 1918, the appellee was an agent of the United Insurance Company of Illinois, and Jacque Ivan Butler issue a note to appellant in exchange for a policy of insurance upon his life, in which policy the appellant was made the beneficiary. The policy was issued on the 18th day of July 1918. The annual premium was paid

upon this policy; the last one being in July 1915. The policy when issued was taken by the deceased and placed in a trunk. On August 22, 1916, said Fred Walter Jones was accidentally killed. It appears that the appellant was aware of the fact that the premium due in July 1916 had not been paid and she supposed that the policy was lapsed and made no effort whatever to collect it. On July 4th, 1917, another son of appellant spoke to the appellee about this policy and asked him if it was any good. The appellee advised him that he did not know, that he could not tell without looking at the policy and for him to bring it up and he would examine it and that he would see Hawthorne, the agent, at Ramsey and ascertain if anything could be done. Appellee says he was unable to ascertain anything from Mr. Hawthorne and that on the 13th or 14th of July he, in company with his brothers Fred and Robert, went to the home of appellant to examine the policy to see if there were any receipts connected with it. A lot of papers were brought to appellee and he searched for receipts but found none. At that time appellant asked what he thought about the policy and he told her he did not think that she could get anything unless they found the receipts but they were unable to find any. At that time he said if the payments had been kept up he could get it but would see what he could do with it, and appellant says that she then promised him that she would give him one-half that he could make out of it. This all occurred about one year after the son's death. The appellee took the policy and as he says attended a meeting of some of the head officers of the Insurance Company at Ramsey and presented the matter to them, but they were unable to tell him whether there could be anything obtained on the policy or not but

upon investigation by some of the officers when they returned home they found that two annual payments had been made. The policy provided that where two annual payments had been made that that would extend the policy for one year and three months after the last payment and as the son was killed within the one year and three months the policy was valid. Thereupon the Company sent to their agent Mr. Hawthorne, at Ramsey, blanks for the making of the proof of the death of the deceased. Appellee claimed that he made three trips to Hillsboro in the making of proofs which were satisfactory, and that after the making of such proofs the appellee went to the law firm of Albert & Albert of Vandalia, Ill., and had a contract prepared, reciting their agreement as to the payment of the one-half to him of whatever he may procure, and re-affirmed the contract and about August 13, 1917 went with said contract to the home of appellant and requested her to sign it and she and the appellee thereupon signed the agreement by which she agreed to pay the appellee one-half of the amount recovered. Within a day or two after this agreement was signed the agent of the Insurance Company came out to the home of appellant and paid her one thousand dollars provided for in the policy. The appellee had not been representing the Insurance Company since January 1, 1917, and was not representing it at the time that he made the contract with the appellant. The appellee had been advised of the payment by the Insurance Company to the appellant of the one thousand dollars and on the same day that he had heard of the payment he went down to the home of appellant but did not find her at home; she was then over at a neighbors named Douglas Wright, making arrangements to go to town to cash the check. The appellee offered to take her but she de-

[illegible] investigation by some of the officers when they re-
turned home they found that the annual payments had been made.
The policy provided that which the annual payments had been
made for that which entitled the policy for the year and
there needed after the last payment and so the one the policy
which the one year and first month the policy was valid.
The insure the company said it that right to. Therefore, at
hearing, claimed for the making of the proof of the death of
the insured. Applies claimed that is not that right to
illustrate in the making of proofs which were satisfactory;
and then after the making of such proofs the insurer was
in the law time of liable a claim of insurance, viz., and
had a contract proposed, providing that automatic in the
payment of the premium in lieu of whatever it may provide.
The re-affirmed the contract and added neither it, left was
with such contract in the case of applicant had repudiated
but in also it was the and the applicant therefore proved the
agreement by which the signed in the repudiation of
of the annual premiums. Within a day or the after this
agreement was signed the death of the insured occurred then
the in the case of applicant and paid for the insurance and
have provided for in the policy. The applicant did not have
sign-revoking the insurance company since January 1, 1917, and
was not impressible at of the time that he made the contract
with the applicant. The applicant had been arrived at the
payment by the insurance company to the applicant of the one
thousand dollars and in the case any that to not which of the
payment is well done to the time of applicant for the not
like one at time: the was that year of a satisfactory sound
insurance right. making allegations is to be made to been
the case. The applicant attorney to have the not the

clined to go with him, saying she would go with Mr. Wright. The appellee then asked her for his one-half of the money, or five hundred dollars. She says she told him she did not think it was right to pay him that much and that he ought to come down some. He first offered to allow her one hundred dollars off and she wanted him to allow more. He finally proposed to take three hundred fifty dollars in settlement of the claim and she agreed to give it to him and they were to meet at Vandalia that evening when she cashed the check and she would pay it to him. They met at Vandalia, she cashed the check and paid the money. It is insisted by counsel for appellant that a fiduciary relation existed between appellant and appellee at the time of making this contract and that he was the agent of the Company and owed her the duty of explaining fully all he knew about the value of this policy. It appears from the record that he was not the agent of the Company at this time but had severed his connection some time before, and so far as the record discloses he did not know at the time she offered to give him one-half of what he could get out of it that the policy had any value, as it was not then known that the two annual premiums had been paid. This appears to have been afterwards discovered upon request of the appellee by the officers of the company. So far as we can see the conditions were not such as to create a fiduciary relation or that he at that time made any false statements to her. Even if it should be conceded that he did not disclose to her all that he knew concerning the policy at the time they made their first agreement, we do not believe that such failure under the circumstances above set forth would authorize her to recover the money back that she paid to him later on. She claims

that he told her that he might have to pay some money out to obtain payment, and this is the misrepresentation relied upon by appellant to avoid this contract. Appellee admits that he told her that he might have to pay some money out, he did not know, but in the conversation had at the time of the settlement wherein she agreed to pay him the $350.00, he then told her that he did not have to make any back payments. Her witness, Douglass Wright, testified that in the conversation there at his home the appellee said to her that he thought he would have to make some back payments but that he did not. Her son, Willie Jones, testified to the same conversation and said that appellee stated he thought he would have to pay out some money but that he did not have to. So that at the time that appellee and appellant agreed upon a settlement of the matters in dispute for $350.00 she was advised of the fact that he did not make any payments of money to obtain the amount due upon the policy. It was the diligence of the appellee that secured the money upon this policy. It is true he did not incur much expense and that he also made three trips to Hillsboro for the purpose of making proof but all of these matters were before these parties at the time they finally settled and adjusted their differences, and she agreed to pay him $350.00 in settlement of his claim, he agreed to accept it and she at that time knew the circumstances. She advised with her neighbor Wright about it and he examined their contract and gave her his opinion about it and so far as we can see, to say the least of it, there was no effort of any kind to conceal the facts, and there is no claim of any in the making of the settlement and in the payment of the $350.00, and we think that this is conclusive upon her and that she will have to abide by her settlement; this

doctrine is well sustained by the case of Dyrenforth vs. Palmer Tire Co., 240 Ill.,34; Hanson vs. Gavin, 280 Ill.,354.

"The criticism made upon Instruction No. 3 is not well taken as we think counsel in his criticism misconstrues the instruction. That instruction had reference to the first contract for the payment of one-half and to the second contract wherein it was agreed to accept $350.00, and did not refer to the written constract as a second contract, as stated by counsel. The other criticisms upon the instructions are determined by the foregoing opinion and it is not necessary to comment further upon them.

"The jury heard the evidence in the case and were instructed by the court on behalf of the appellant that if appellant was induced by the fraud of appellee to pay him the $350.00 that then such fraud would vitiate the contract but the jury in its finding must have determined that there was no fraud in the obtaining of this money or they would have rendered a verdict in favor of the plaintiff but instead their verdict was for the defendant. We cannot say that the verdict of the jury was manifestly against the weight of the evidence or that there are any reversible errors committed in the trial of the case, and the judgment of the lower court is affirmed."

JUDGMENT AFFIRMED.

doctrine is well sustained by the case of Greenleaf vs. Palmer Life Co., 190 Ill.,141; Insurance vs. Smith, 190 Ill.,304.

"The criticism made upon instruction 5, I do not well know as we think counsel is the criticism misconstrues the instruction. That instruction had reference to the first contract for the payment of non-forfeit and to the second contract which merely it was agreed to accept $200.00, and did not refer to the written contract as a second contract, as stated by counsel. The other criticism upon the instructions are sustained by the foregoing opinion and it is not necessary to discuss further upon them.

"The jury heard the evidence in the case and were instructed by the court in behalf of the appellant that if appellant was induced by the fraud of appellee to pay him the $100.00 that then such fraud would vitiate the contract but the jury in the finding must have determined that there was no fraud in the obtaining of this money or they would have rendered a verdict in favor of the plaintiff for instead their verdict was for the defendant. We cannot say that the verdict of the jury was manifestly against the weight of the evidence as that there are any reversible errors committed in the trial of the case, and the judgment of the lower court is affirmed."

Judgment affirmed.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th *day of* July *A. D. 191*4.

C. C. Johnson

Clerk of the Appellate Court

NOINIc

614a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

214 IA 659 IA

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Reh'g allowed 3/25/19

Mary E. Jones,
Appellant

vs.

No. 51
March Term, 1918.

Clyde E. Hooker,
Appellee

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

HON. W. B. WRIGHT

Term No. 51. In the Appellate Court, Agenda No.54

Fourth District.

March Term A. D. 1918.

Mary E. Jones, Appellant.	)	
vs.	)	Appeal from the Circuit Court of Fayette County.
Clyde E. Hooker, Appellee.	)	

Pearide, J.

The appellant instituted this suit to recover from appellee $350.00 that she had paid to him under the following circumstances; on July 11, 1913, the appellee was an agent of the Central Insurance Company of Illinois, and induced Fred Walter Jones a son of appellant to take out a policy of insurance upon his life, in which policy the appellant was made the beneficiary. The policy was issued on the 18th day of July 1913. Two annual premiums were paid upon this policy; the last one being in July 1915. The policy when issued was taken by the deceased and placed in a trunk. On August 22, 1916, said Fred Walter Jones was accidentally killed. It appears that the appellant was aware of the fact that the premium due in July 1916 had not been paid and she supposed that the policy was lapsed and made no effort whatever to collect it. On July 4th, 1917, another son of appellant spoke to the appellee about this policy and asked him if it was any good. The appellee advised him that he did not know, that he could not tell without looking at the policy and for him to bring it up and he would examine

[illegible]

[illegible]

[illegible]

it and that he would see Hawthorne, the agent, at Ramsey and ascertain if anything could be done. Appellee says he was unable to ascertain anything from Mr. Hawthorne and that on the 13th or 14th of July he, in company with his brothers Fred and Robert, went to the home of appellant to examine the policy to see if there were any receipts connected with it. A lot of papers were brought to appellee and he searched for receipts but found none. At that time appellant asked what he thought about the policy and he told her he did not think that she could get anything unless they found the receipts but they were unable to find any. At that time he said if the payments had been kept up he could get it but would see what he could do with it, and appellant says that she then promised him that she would give him one-half that he could make out of it. This all occurred about one year after the son's death. The appellee took the policy and as he says attended a meeting of some of the head officers of the Insurance Company at Ramsey and presented the matter to them but they were unable to tell him whether there could be anything obtained on the policy or not but upon investigation by some of the officers when they returned home they found that two annual payments had been made. The policy provided that where two annual payments had been made that that would extend the policy for one year and three months after the last payment and as the son was killed within the one year and three months the policy was valid. Thereupon the Company sent to their agent Mr. Hawthorne, at Ramsey, blanks for the making of the proof of the death of the deceased. Appellee claimed that he made three trips to Hillsboro in the making of proofs which were satisfactory, and that after the making of such proofs the appellee went to the law firm of Albert &

It was that he would see Lawrence, the agent, at Tempsey
and investigate if anything could be done. Appellee also he
was unable to understand anything from Mr. Lawrence and left
on the 5th or 6th of July so, in company with the witness
Fred and Andrew, went to the home of appellant to examine
the policy to see if there were any penalty provisions with
it. A lot of papers were brought to appellee and he searched
for twenty-five forced years. It was time expiration added
when he discovered that the policy was in force so he did not
think that she might get anything unless they found the po-
licy; but they were unable to find any. At that time he
said if the company had been duty by us would put it but
again we must be ready to give it, and appellee says that
the time presented the time would give the necessary that
he would take out of it. This all occurred about the year
after the war's death. The appellee had the policy and he
by any attempted a position of some of the land citizens of
the Insurance Company or company and requested the notice to
them but they were unable to tell him whether there would be
anything attached on the policy or not but upon investigation
by some of the citizens when they returned home they found
that the account payments had been made. The policy provided
that when the account payments had been made that that would
extend the policy for one year and there were months after the last
payment and so the son was filled with the one year and
there notice the policy was valid. Therefore the company was
in their equal to. Therefore, at Tempsey, Alaska for the wan-
ing of the proof of the death of the insured. Appellee
claimed that he made some trips to Ketchikan in the making
of proofs which were satisfactory, and that after the making
of such proofs the supplies went to the law firm of Gilbert &

Albert of Vandalia, Ill., and had a contract prepared, reciting their agreement as to the payment of the one-half to him of whatever he may procure, and re-affirmed the contract and about August 13, 1917 went with said contract to the home of appellant and requested her to sign it and she and the appellee thereupon signed the agreement by which she agreed to pay the appellee one-half of the amount recovered. Within a day or two after this agreement was signed the agent of the Insurance Company came out to the home of appellant and paid her one thousand dollars provided for in the policy. The appellee had not been representing the Insurance Company since January 1, 1917, and was not representing it at the time that he made the contract with the appellant. The appellee had been advised of the payment by the Insurance Company to the appellant of the one thousand dollars and on the same day that he had heard of the payment he went down to the home of appellant but did not find her at home; she was then over at a neighbors named Douglas Wright, making arrangements to go to town to cash the check. The appellee offered to take her but she declined to go with him, saying she would go with Mr. Wright. The appellee then asked her for his one-half of the money, or five hundred dollars. She says she told him she did not think it was right to pay him that much and that he ought to come down some. He first offered to allow her one hundred dollars off and she wanted him to allow more. He finally proposed to take three hundred fifty dollars in settlement of the claim and she agreed to give it to him and they were to meet at Vandalia that evening when she cashed the check and she would pay it to him. They met at Vandalia, she cashed the check and paid

the money. It is insisted by counsel for appellant that a fiduciary relation existed between appellant and appellee at the time of making this contract and that he was the agent of the Company and owed her the duty of explaining fully all he knew about the value of this policy. It appears from the record that he was not the agent of the Company at this time but had severed his connection some time before, and so far as the record discloses he did not know at the time she offered to give him one-half of what he could get out of it that the policy had any value, as it was not then known that the two annual premiums had been paid. This appears to have been afterwards discovered upon request of the appellee by the officers of the company. So far as we can see the conditions were not such as to create a fiduciary relation or that he at that time made any false statements to her. Even if it should be conceded that he did not disclose to her all that he knew concerning the policy at the time they made their first agreement, we do not believe that such failure under the circumstances above set forth would authorize her to recover the money back that she paid to him later on. She claims that he told her that he might have to pay some money out to obtain payment, and this is the misrepresentation relied upon by appellant to avoid this contract. Appellee admits that he told her that he might have to pay some money out, he did not know, but in the conversation had at the time of the settlement wherein she agreed to pay him the $250.00, he then told her that he did not have to make any back payments. Her witness, Douglas Wright, testified that in the conversation there at his home the appellee said to her that he thought he would have to make some back payments but that he did not. Her son, Willie Jones, testified to the same conversation and said

the money. It is instead by thought for speculator that a
fiduciary relation arises between speculators and speculators at
the time of making their investment and that in one the agent
of the Company and need not be guilty of misconduct fully all
that they about the nature of this relation. It requires from the
receipt that he was not the agent of the Company as this time
but had assumed his responsibility some time before, and so has
as the lapse claimants he did not know at the time the ac-
tions to give the benefit of what he could not not of it
that the policy had any value, as it was not then known that
the law should prevent but then paid. This argument is been
been alternate disregarded upon receipt of the supplies by
the officers of the company. We can in no way see the conse-
quence are not such as to create a fiduciary relation as that
he at that time made any false statements to her. Even if it
should be assumed that he did not disclose to her all that
he knew concerning the policy at the time they made their
first agreement, we do not believe that such failure amount
the misrepresentation which the first would justify her in re-
ceive the money back that she paid to the insurer. The claimant
that he did not that to might have to pay some money back to
actual payment, and this is the misrepresentation relied upon
by appellant to avoid this contract. Question then is that he
did not that he might have to pay some money back, he did
not know, and is the misrepresentation that at the time of the ad-
ismer matrix the agreed to pay the difference, he knew
that her that he did not have to make any such payments. Her
affidavit, supplies reason, including that in the misrepresentation
there is the same the application said to her that he thought he
would have to make some back payments but that he did not, for
her, which issue, herewith to the same misrepresentation and said

that appellee stated he thought he would have to pay out some money but that he did not have to. So that at the time that appellee and appellant agreed upon a settlement of the matters in dispute for $350.00 she was advised of the fact that he did not make any payments of money to obtain the amount due upon the policy. It was the diligence of the appellee that secured the money upon this policy. It is true he did not incur much expense and that he also made three trips to Hillsboro for the purpose of making proof but all of these matters were before these parties at the time they finally settled and adjusted their differences, and she agreed to pay him $350.00 in settlement of his claim, he agreed to accept it and she at that time knew the circumstances. She advised with her neighbor Wright about it and he examined their contract and gave her his opinion about it and so far as we can see, to say the least of it, there was no effort of any kind, to conceal the facts and there is no claim of any in the making of the settlement and in the payment of the $350.00, and we think that this is conclusive upon her and that she will have to abide by her settlement; this doctrine is well sustained by the case of Byrenforth vs. Palmer Tire Co., 245 Ill., 34; Hanson vs. Davin, 256 Ill., 354.

The criticism made upon Instruction No. 1 is not well taken as we think counsel in his criticism misconstrues the instruction. That instruction had reference to the first ~~xxxx~~ contract for the payment of one-half and to the second contract wherein it was agreed to accept $350.00, and did not refer to the written contract as a second contract, as stated by counsel. The other criticisms upon the instructions are determined by the foregoing opinion and it is not necessary to comment further upon them.

The jury heard the evidence in the case and were instructed by the court on behalf of the appellant that if appellant was induced by the fraud of appellee to pay him the $350.00 that then such fraud would vitiate the contract but the jury in its finding must have determined that there was no fraud in the obtaining of this money or they would have rendered a verdict in favor of the plaintiff but instead their verdict was for the defendant. We cannot say that the verdict of the jury was manifestly against the weight of the evidence or that there are any reversible errors committed in the trial of the case, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

The jury based the evidence in the case and were instructed by the court to decide if the defendant that it appeared was imposed by the trend of society to say his the court. If this does not take which affects the contract but for law. In the finding must have determined that there was no crime in the obtaining of this money or that there had reached a verdict in favor of the plaintiff but stated that verdict rendered the defendant. To correct and that the amount of the jury was unlawfully against the weight of the evidence or that there was not sufficient evidence to the view, and the judgment of the lower court is affirmed.

Judgment affirmed.

All is by the judgment in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 6-7 *day of* Jul *A. D. 191*9.

Clerk of the Appellate Court

NOINI

405 - 21392

J. E. McCOY et al.,
Appellees,

vs.

ACME AUTOMATIC PRINTING
COMPANY, a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

615a

214 I.A. 659

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment rendered in favor of plaintiffs, in an action for deceit. The jury returned a verdict for $4,127.83, but plaintiffs voluntarily entered a remittitur for $2,700.00, whereupon the court entered judgment for $1,427.83.

Plaintiffs entered into an agreement by the terms of which they were to have the exclusive right to sell, in the territory therein described, a certain printing device manufactured by the defendant, the Acme Automatic Printing Company. The contract purported to have been made by and between the Patent Novelty Company and the defendant company, as parties of the first part, and the plaintiffs, doing business under the name of the Automatic Printer Company, party of the second part.

The action was based primarily upon misrepresentations alleged to have been practiced upon plaintiffs by defendant through one Roberts, with respect to the territory over which they were given the exclusive right of sale.

The evidence shows that prior to June 12, 1912, the said Roberts called upon plaintiffs and entered into negotiations with them for a contract giving them an exclusive agency covering the state of Tennessee and certain counties in Kentucky

21 1 1/. 659

for the sale of the automatic printing device manufactured by the defendant; that on said date plaintiffs telegraphed defendant at its Chicago office, as follows:

> "Has W. A. Roberts as sales manager of the Patent Novelty Company of Atlanta, Georgia, authority to contract for state agents or managers for your company for the states of Tennessee and Kentucky for sale of automatic printing attachment."

to which defendant replied on the same day:

> "W. A. Roberts of Patent Novelty Company has full authority to close contract for exclusive sale of our machines both Tennessee and Kentucky."

Accordingly a contract was entered into between the parties, which was signed by the Automatic Printer Company (plaintiffs) on the one side, and the Patent Novelty Company and the defendant company on the other, by "W. A. Roberts, State Manager."

The witness Howell, who was one of the plaintiffs, testified that the said Roberts represented that the proposed territory had never been canvassed for the sale of the said device, and that he (Roberts) was the agent of the defendant company, with authority to contract on its behalf, whereupon the foregoing telegram was sent to the defendant at Chicago. (This latter evidence was omitted in the abstract of the record.)

The said Roberts did not testify, but it was admitted by plaintiffs that if he had, he would have denied having made any of the said representations to the plaintiffs respecting the previous canvassing of the territory and his authority to represent the defendant company.

The undisputed evidence shows that the territory in question had been previously canvassed for the sale of the device in question.

In view of the representations alleged to have been made by the said Roberts and the defendant's answer to plain-

tiff's telegram hereinabove quoted, defendant cannot now be heard to deny Robert's authority to make the contract in question on its behalf; and hence it is bound by any material representations made which induced plaintiff to execute the contract in question and which plaintiffs reasonably acted upon to their injury.

Complaint is made of the remarks of the court during the progress of the trial. The record discloses the following:

> "Q. State whether or not you (Howell) relied on what Mr. Roberts stated to you in that conversation. (objection)
>
> THE COURT: Overruled. You cannot go out and get a sucker and then keep him from relying on your representations."

Later in the course of the trial, the court, in referring to the representations made by the said Roberts, characterized them as lies.

In view of the fact that the evidence was conflicting, and of the further circumstance that the verdict was so large that plaintiffs voluntarily remitted nearly two-thirds of the amount thereof, we cannot escape the conclusion that the remarks complained of were harmful. For this reason alone the judgment must be reversed and the cause remanded for a retrial.

REVERSED AND REMANDED.

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Complaint is made of the remarks of the court during the progress of the trial. The record discloses the following:

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> THE COURT: Overruled. You cannot go out and get a sucker and then keep him from relying on your representations."

Later in the course of the trial, the court, in referring to the representations made by the said Roberts, characterized them as lies.

In view of the fact that the evidence was conflicting, and of the further circumstance that the verdict was so large that plaintiffs voluntarily remitted nearly two-thirds of the amount thereof, we cannot escape the conclusion that the remarks complained of were harmful. For this reason alone the judgment must be reversed and the cause remanded for a retrial.

REVERSED AND REMANDED.

131 - 24438

SIDNEY SCHWALNY, a minor, by Stanley Wenz, his next friend,
Defendant in Error,

vs.

MAX FIERSTEIN,
Plaintiff in Error.

Error to
Circuit Court,
Cook County.

214 I.A. 659

MR. PRESIDING JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Action to recover damages for personal injuries. Verdict and judgment for plaintiff for $5,000. Writ of error by defendant.

Plaintiff, a minor eighteen years old, was a passenger on a northbound Robey street car, in the city of Chicago. The car stopped at the intersection of Fowler street and plaintiff alighted from the front platform thereof. As he stepped onto the pavement, he was immediately struck by a northbound automobile truck operated by defendant's servants.

Plaintiff's declaration charged defendant with negligence in the operation of the said truck; in failing to have same under proper control; in failing to keep a lookout for plaintiff while alighting from said car; in operating its truck at an excessive rate of speed; and in operating said truck in violation of a city ordinance prohibiting vehicles from passing street cars which had stopped to discharge passengers.

It is insisted that the verdict is clearly and manifestly against the weight of the evidence.

In our opinion, no useful purpose would be served in detailing the testimony of the various witnesses on the issues involved. We deem it sufficient to state that we have examined

the record with care and are clearly of the opinion that the verdict is amply supported by the evidence.

It is also urged that the damages awarded are excessive.

The evidence tended to show that as a result of the injuries received plaintiff was confined to his bed for upwards of three months after the accident, during which time he suffered severely; that thereafter and up to the time of the trial, there was an abnormal curvature of the spine in the lumbar region; a displacement of the scapula; a shrinking of the sacro-iliac joint, together with other injuries. In view of the serious and permanent nature of plaintiff's injuries, we are not disposed to hold that the damages awarded are excessive.

There being no other errors relied upon, the judgment will be affirmed.

AFFIRMED.

the record which does not show a desire of the opinion that the [illegible] is solely responsible for the outcome.

It is also worth noting that Congress [illegible] [illegible] [illegible].

The evidence tended to show that as a result of the injuries received physically and emotional in his [illegible] of these months after the accident, during which time he suffered severely; that [illegible] as to the time of the [illegible], there was a substantial correlation of the pains in the lumbar region; a disturbance of the [illegible], a deviation of the spine-like joint, [illegible] with other injuries. In view of the opinion and testimony [illegible] of plaintiff's injuries, we are not disposed to hold that the [illegible] abused its discretion.

There being no other errors raised here, the judgment will be affirmed.

AFFIRMED.

140 - 24447

EDWARD HINES LUMBER COMPANY,
a corporation,
Appellee,

vs.

B. S. LIPPINCOTT et al.,
On appeal of JOHN ROSSI,
KATE ROSSI, ALBERT J. BROCKMAN,
and ALBERT J. BROCKMAN, Trustee,
Appellants.

214 I.A. 659

Appeal from
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree for a mechanics' liens in favor of an original contractor and certain subcontractors and material men.

The bill was filed by the Edward Hines Lumber Company, a subcontractor, against John Rossi and Kate Rossi, his wife, as joint owners of the property here in question, Benjamin S. Lippincott, the principal contractor, and one Albert J. Brockman, owner of certain notes for $12,000 executed by the said Rossis and secured by trust deed on said property to obtain a building loan to improve same.

The firm of Lundin & Zimmerman, B. Golinski, and F. M. Grotowski, subcontractors and material men, filed intervening petitions in said cause, setting forth their respective claims for liens on said premises, while the said Lippincott's claim for a lien thereon was set forth by way of answer to the bill.

It appears from the record that the said Rossis, being desirous of improving the real estate in question, entered into a verbal agreement during the month of March, 1916, with the said Lippincott, whereby the latter agreed to furnish material and construct a building thereon, consisting of stores and flats,

as per plans submitted, for the sum of $16,078, payment therefor to be made to the said Lippincott as the work on the building progressed; that the said John Rossi acted as the duly authorized agent of the said Kate Rossi in all matters pertaining thereto; that subsequently to the making of the aforesaid agreement, the said Rossis arranged for a building loan of $12,000 on said property, from the said Brockman; that thereafter the said Lippincott proceeded to construct the said building, and by the latter part of August, 1916, had it under roof; that said Lippincott then called upon the said John Rossi for a payment on account, but was informed by the latter that said Rossis were unable to make any payment on the contract as they were without funds and advised the said Lippincott to call upon the said Brockman for a payment out of the building fund; that thereupon both the said Rossi and the said Lippincott called upon the said Brockman and the latter requested a payment of $5,000 from said building fund; the said Brockman, however, refused to pay said amount, and on August 22, 1916, the said Lippincott stopped work on the building. After a lapse of upwards of two months, the said Rossis and the said Lippincott entered into a written contract confirming the verbal agreement theretofore made and providing further that said Lippincott should complete the building within a reasonable time in consideration of which the said Rossis agreed, by way of payment, to convey to him a certain lot on Rockwell street in the city of Chicago, valued at $4,500 subject to an incumbrance of $2,200; also to turn over to said Lippincott the avails of the building fund aggregating $12,000, less certain deductions therein provided for of which last said amount $5,500 was to be paid to the said Lippincott upon the production of certain waivers of lien and a contractor's statement of the amount due for labor and material furnished,

in compliance with the provisions of the Mechanics' Lien Act. It was further therein provided that u on the completion of the said building and of the surrender of the possession thereof to the said Rossis, the said Lippincott was to receive a warranty deed thereto as security for the payment of any balance due him under the said contract and for any extra work done or material furnished by him pursuant to the agreement of the parties; the said balance, if any, to be paid by said Rossis to the said Lippincott in monthly installments as therein provided, until fully paid, - in which latter event the said Lippincott agreed to reconvey the said premises to the said Rossis.

Upon the execution of the aforesaid contract, the said Lippincott produced waivers of liens from various contractors and material men therein provided for, including one from himself, all of which were waivers in full, except his own and that of the Edward Hines Lumber Company, which latter two were waivers "to date;" whereupon the said Lippincott was paid the sum of $5,500 out of said building fund, which was distributed among the subcontractors. Thereupon work on said building was resumed by the said Lippincott and was continued until the building was nearly completed, when he again discontinued work thereon because of the alleged breach of the said last mentioned contract on the part of the said Rossis, by failing to convey to the said Lippincott the aforementioned lot on Rockwell street as therein provided; by assigning the rents to be derived from the building in question, to the said Brockman; and by using part of the avails of the building fund in question for purposes not contemplated by the said contract.

It appears from the record that said Rossis were not in a position to convey the lot on Rockwell street to the said Lippincott, for the reason that said property w s purchased by

them on the installment plan, and at the time they entered into the contract here in question they were in arrears in payments on the purchase price of said lot in the sum of $350, and that no payments thereon were made by them after the building contract in question was entered into. It also appears that said Brockman had paid out of the aforesaid building fund upwards of $1,000 for purposes not provided for by said contract.

Said Lippincott filed a claim for mechanics' lien within the time and in the manner provided by statute.

It is contended by the appellants, the said Rossis and the said Brockman, that the said Lippincott is not entitled to a mechanics' lien under the terms and provisions of the aforesaid contract and the facts disclosed by the record herein. The point is made that inasmuch as he agreed to accept the said lot on Rockwell street in part payment of the amount due him under the aforesaid building contract, to that extent at least his claim did not constitute one for money due within the meaning of the Mechanics' Lien Act.

A complete answer to this contention is found in the fact that said Rossis breached their said contract, and hence the agreement to pay the said Lippincott in property of the net value of $2,300 became, in default of payment, an obligation to pay money due. Barstow et al. v. McLachlan et al., 99 Ill. 641; McKinnie et al. v. Lane, 230 Ill. 544.

The contract having been breached by the said Rossis, the said Lippincott had the right to treat it as at an end and to recover the amount due when the right to abandon same was exercised. Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623. See also sec. 4, Mechanics' Lien Act.

The said Lippincott's waiver of lien "to date" did not bar his right thereto for work done and materials furnished thereafter, and a waiver of lien by an original contractor, executed after the making of a contract with a subcontractor or material man will not affect the latter's right thereto. Kelly v. Johnson, 251 Ill. 135.

Other points have been raised by appellants, a discussion of which would prolong this opinion unnecessarily. Suffice it to say that in our opinion the liens provided for in the decree appealed from were properly allowed to the original contractor and the said subcontractors and material men, - the latter's claims to be deducted from the amount due the principal contractor under the original contract.

The decree will therefore be affirmed.

AFFIRMED.

162 - 24508

CHARLES A. BENTLEY,
Appellant,

vs.

CARRIE LOUISE BENTLEY,
Appellee.

Appeal from
Superior Court,
Cook County.

214 I.A. 660

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Bill for divorce on the ground of desertion. Service by publication. Default of defendant. Bill dismissed on hearing. Complainant appeals.

The desertion was alleged to have taken place on September 1, 1909, at Pittsburg, Pennsylvania, where the parties were then temporarily located.

Complainant testified that he was a vaudeville performer; that at the time of the hearing and for upwards of eight years prior thereto, he resided in the city of Chicago; that because of the nature of his employment he was away from the city for the greater part of each year; that during the aforesaid period he had retained and paid for his room here throughout the year and kept part of his personal effects therein, and that he had no other place of residence. His testimony in this regard was corroborated by the person from whom he rented said room, and one Walsh, complainant's partner.

During the progress of the hearing, the court stated that he would require a copy of the bill of complaint to be served personally on the defendant, who resided in the State of Connecticut. To this counsel for complainant assented and asked for a continuance of the hearing to enable him to comply with the court's request, whereupon the court announced he would

dismiss the bill for want of jurisdiction; that in his opinion complainant had failed to establish a residence in the State of Illinois for one year prior to the filing of said bill. Accordingly the bill was dismissed for want of jurisdiction and for want of equity, but it clearly appears that said order of dismissal was based on jurisdictional grounds.

The controlling question here presented for determination is whether or not the complainant established a residence in the State of Illinois as required by the Divorce Act.

In our opinion, the foregoing evidence, which was undisputed, was sufficient to prove at least prima facie that for more than one year prior to the filing of the bill of complaint, complainant's legal residence was in Illinois. Albee v. Albee, 141 Ill. 550.

It follows, therefore, that the bill of complaint was erroneously dismissed. Accordingly the decree will be reversed and the cause remanded for a hearing on the merits.

REVERSED AND REMANDED.

5 - 23684

DONALD I. GRAHAM,
Plaintiff in Error,

vs.

THOMAS F. HOWE et al.,
Defendants in Error.

Error to
Circuit Court,
Cook County.

214 I.A. 660²

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error filed a bill against defendants in error seeking an accounting predicated upon the claim that he was a copartner with defendants Howe and Fordham, or entitled to one-third of the stock of the defendant, Corporation Service Company, organized by them, or a share in the profits of said Company. Whether complainant was entitled to an accounting depended on whether or not he had any such verbal agreement with defendants Howe and Fordham as set forth in his bill of complaint. The chancellor properly first heard evidence as to whether complainant had such a contract, and the right to an accounting existed (Barnes v. Barnes, 282 Ill. 593), and the real question presented here is whether he decided that question of fact correctly. The question of fact was narrowed down to whether there was a co-partnership as alleged, or any contract whereby complainant had an interest in the profits of said Company.

It appears that Howe and Fordham were engaged in the practice of law and maintained in connection with their law offices what is termed a "tax business" wherein they represented persons before taxing bodies for the purpose of obtaining a reduction or elimination of their taxes. To conduct this business they subsequently organized said company into a corporation. Before that time complainant was in the employ of Howe and Fordham on a salary, engaged mainly in soliciting

that character of business. He claimed that subsequently he entered into a verbal contract with them whereby he acquired such alleged interests. Defendants contended that he continued to be employed at a salary and that no such contract as he claims was entered into. The primary question, therefore, was whether there was such a contract as plaintiff contended for. After hearing the testimony bearing thereon the court dismissed the bill for want of equity, thus deciding in effect that complainant had no such contract as entitled him to an accounting, or else that the evidence was insufficient or too doubtful to sustain his contention.

After a careful review of the record we find nothing that would warrant us in reversing the court's conclusions, and therefore it would subserve no useful purpose to give a detailed analysis of the evidence. We are practically asked to find the chancellor's findings of fact are against the weight of the evidence. Where, as here, the testimony is conflicting and the chancellor sees and hears the witnesses, the decree entered by him will not be disturbed upon a question of fact unless it appears that the findings of fact are clearly and palpably wrong. (Preston v. Lloyd, 269 Ill. 152, 163.) No citations of authority are necessary to support the well established doctrine in this State that clear and palpable error must appear in such a case before a reversal will be had. We find no such error or any good reason for dissenting from the conclusions of the chancellor.

It is also urged that the court improperly received in evidence a written document introduced by defendants to show the relationship of the parties. It was not signed by complainant, but there is proof tending to show it was executed

in duplicate and that complainant recognized it as in force and binding upon him.

Complainant assigned to said corporation certain contracts made in his name with clients in the "tax business." He urges that regardless of other relief prayed for the bill lies for the cancellation of such assignments. The document or contract referred to expressly provided that he should have no personal interest in the contracts so assigned and contemplated other reasons for making them in his name. This was the view evidently taken by the chancellor and supported by other evidence.

Other points are raised but it is unnecessary to consider them. All rights to relief depended upon whether or not complainant had such a contract as that on which his claim to relief is predicated. We find no good reason for disturbing the court's conclusion that the evidence was either insufficient or too doubtful to establish the existence of such a contract. The decree will be affirmed.

AFFIRMED.

71 - 23981

EZRA L. KERN, Plaintiff in Error, vs. ESTELLE FOSTER, Defendant in Error.	Error to Municipal Court of Chicago.

214 I.A. 660 3

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ is sued out to reverse a judgment for $200 against plaintiff in error. The court below vacated that judgment and entered one in favor of plaintiff in error for $17.50. Defendant in error appealed from the latter judgment and we reversed it at the October term, 1917, and remanded the cause with directions to expunge from the record the judgment so appealed from, and also the order vacating the previous judgment of $200 which this writ is brought to review. But there is nothing to review. The transcript of record filed on the appeal was refiled in this cause without any change. It therefore not only does not show that the judgment we are asked to review had been restored of record, but contains no new assignment of errors. We having already denied plaintiff in error's motion to supply the omission of an assignment of errors the writ must, under Rule 12 of this court, be dismissed.

WRIT DISMISSED.

145 - 24064

W. R. SCHUSSLER,
Appellee,

vs.

JOHN O. JOHNSON,
Appellant.

Appeal from
Municipal Court
of Chicago.

214 I.A. 660

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee contracted to sell, and appellant to buy, an 80 acre tract of real estate at the price of $11,600 of which $300 was paid down as earnest money to be applied on the purchase when consummated, and the balance was to be paid, $2700 in cash and $8600 in notes secured by mortgage or trust deed.

The evidence tends to show that appellant refused to carry out his contract and appellee brought this suit for a breach thereof, retaining said earnest money. The case was heard without a jury and the court assessed the damages at $900 after deducting the $300 retained by plaintiff.

Appellant filed a set-off for the $300 so retained, claiming that appellee had first breached the contract by failing to deliver an abstract continued to the date of the contract, as provided for therein. But we think the court was justified in finding from the evidence that this provision of the contract was waived.

The clause in the contract as to the earnest money reads:

> "Should said purchaser fail to perform this contract promptly on his part, at the time herein specified, the earnest money paid as above, shall at the option of the vendor be forfeited as liquidated damages * * * and this contract shall become null and void."

Appellee did not express his option in the matter otherwise than by bringing this suit. If from his action in retaining the earnest money without giving any notice of an exercise of such option a purpose to retain the money as liquidated damages may rightly be implied, as contended by appellant, then he can recover no further damages in this suit. If, on the other hand, no such inference follows but the damages suffered did not exceed the amount of the earnest money, then no recovery can be had.

The evidence tending to show a breach of the contract the question arises, what were the damages? Plaintiff's evidence was to the effect that the cash market value of the land at the time of making the contract was from $125 to $140 per acre. Undisputed evidence tended to show that a sale on credit, or part credit, is usually about ten per cent above the cash market value. This would reduce the purchase price of $11,600 to $10,545 as a proper basis for computation of damages. Taking the cash market value at the most favorable figure for plaintiff, $125 per acre, the land was worth $10,000, and in that case his loss by the breach was $545. He actually received $10,300 in cash on a subsequent sale, so that his loss on that basis was only $245. As he holds $300 to be accounted for, his damages in the former case would be $245, and in the latter case he would owe appellant $55. At best the damages based on opinions of values can only be approximately arrived at, and the margin, either way, in the case at bar would be small if it could be actually determined. We think there is no preponderance of evidence that the loss exceeded the amount of the earnest money, nor can we say it was less. In other words, the evidence clearly

tends to show that the loss and the set-off were about equal, and our finding will be to that effect. The judgment below will be reversed with a finding of fact in accordance with this conclusion.

REVERSED WITH FINDING OF FACT.

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[illegible]

[illegible]

145 - 24064

FINDING OF FACT.

We find that appellant, John O. Johnson, breached the contract sued on and that appellee, W. R. Schussler, suffered damages by reason thereof to the amount of $300, and that appellant, John O. Johnson, has a valid set-off for the same amount.

145 - 24064

W. R. SCHUSSLER,
Appellee,

vs.

JOHN O. JOHNSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

I.A. 660 4A

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee contracted to sell and appellant to buy certain real estate. By the terms of the contract the latter deposited $300.00, as earnest money, and the contract provided that:

> "Should said purchaser fail to perform this contract promptly on his part, at the time herein specified, the earnest money paid as above, shall, at the option of the vendor, be forfeited as liquidated damages * * * and this contract shall become null and void."

The evidence tends to show that appellant refused to carry out his contract. Appellee then conveyed the property to another, retained said earnest money and brought suit for a breach of the contract. The case was heard without a jury and the court assessed damages in the sum of $900, being the difference between the contract price and proven market value of the real estate less the amount of said earnest money.

Appellant filed a set-off for the $300, claiming that appellee first breached the contract by failing to deliver to him an abstract continued to the date of the contract, as provided for in the contract. But we think the court was justified in finding from the evidence that this provision of the contract was waived and that it was useless to comply therewith after appellant abandoned the contract.

We think, too, that appellee under the contract and circumstances has no cause of action and appellant no right of

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[illegible]

set-off. The former by subsequently conveying the property to a third party elected to rescind (39 Cyc. p. 1383; McLeod v. Sharp, 53 Ill. App. 406) and thereby exercised the option provided for in the contract to treat it as void because of appellant's non-compliance with its terms, and to keep the earnest money as provided in the contract.

He could either stand upon the contract and sue for a breach, or acquiesce in appellant's abandonment and treat it as rescinded. (id. p. 1354) He could not do both. (id.) In effect he acquiesced in appellant's abandonment when he conveyed the property to a third party, and then could no longer stand on the contract except to exercise the option therein given of retaining the earnest money. The clause avoiding the contract in default of performance on the part of the purchaser gave the vender an opportunity to rescind (id. 1359) which, as before stated, he exercised when he conveyed the property to another. Accordingly the judgment will be reversed.

REVERSED.

382 - 24509

JOHN M. VAIL,
Appellee,

vs.

CHICAGO SURFACE LINES
et al.,
Appellants.

Appeal from
Circuit Court,
Cook County.

214 I.A. 661

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action on the case for personal injuries received by appellee (plaintiff below) from being struck by a street car of appellants at the intersection of Broadway and Waveland streets, Chicago, between 8:30 and 9:00 p. m., June 23, 1914. The car was going north on the former street and plaintiff east on the north side of the latter. There was no building on any corner at the intersection except the northeast corner, where there was a store lit up with three 100 watt tungsten lights, two in the front windows (on Broadway) and one in the side, having half-frosted globes. There was an arc street light at the southwest corner. Appellee concedes that the street car was lighted up from the inside, and although he says he saw no headlight on it the undisputed evidence is that the car had one. There is nothing in the record to indicate unusual darkness from conditions like heavy clouds, mist or fog, and there was no obstruction between plaintiff and the car from the time he left the sidewalk up to the time of the accident. He was seen plainly by the motorman and a passenger on the car from the time he stepped from the sidewalk, but said that he did not see the car (according to his last statement) until it was from 25 to 30 feet from him, when he was between the rails of its track.

We cannot escape the conclusion, even from his own

testimony, that if he did not see the car it was because he did not look. While he claimed to have looked both ways continuously from the time he left the sidewalk and that he did not see the car, he offered no excuse consistent with physical facts and laws that would prevent his seeing it had he looked. One will not be heard to say he looked and did not see, when by looking he could not but see. His only excuse for not seeing the car was the glare of the lights in said store windows towards which he was approaching. He said it "almost blinded him," and he could not see so well to the south. But if conscious of that fact he certainly should have exercised more care in trusting his eyesight. Despite the glare he "could see on across Waveland over east," and when in the middle of the sidewalk at the northwest corner saw 50 to 100 feet south of the crossing. Of course, he could see farther as he approached the tracks. Defendant's testimony was that the car was then 20 feet south of the crossing. It is inexplicable that with conceded good sight he could not see car lights that distance, or the car itself as it passed the arc light at the corner, the existence of which was not disputed.

He said, too, that he heard no gong, but both the motorman and a passenger standing by him testified that it was sounded from the time appellee left the sidewalk, but that nevertheless he continued to walk straight on with his head down. Neither seeing nor hearing under such circumstances would indicate a state of mental absorption that made him oblivious of his surroundings.

The inconsistency of his own testimony with physical facts and laws is emphasized too by variations of his testimony in important particulars and its more or less apologetic

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character. But taking his final version of the facts he said he "could see 100 feet south of the corner" when he started from the sidewalk; that "the car was lighted up on the top;" that he did not see the car at all when in the west bound track though looking to the south; that he saw it for the first time when in the middle of the east bound track and that it was then from 35 to 40 feet away from him; that at that time he was walking at an ordinary gait and simply quickened his step when he saw the car. These statements cannot be reasonably reconciled with undisputed conditions that enabled him to see the car any time after he left the sidewalk if he had looked toward it.

The only direct evidence as to the car's speed, aside from his own (of which he could hardly judge if he did not see the car until it was within 20 to 40 feet from him) was, that the car slowed up at the corner and was going from 10 to 12 miles an hour, and that the power was reversed and brakes applied when the car reached the middle of the crossing. The passenger who saw appellee from the time he left the sidewalk testified that he walked into the car track when the car was within 10 or 12 feet of him. He himself at one time testified that the car was then within 20 feet of him. There can be no question that the deductions from his own evidence, to say nothing about the clear preponderance of the evidence, are to the effect that he did not exercise ordinary care for his own safety. If by the exercise of ordinary care plaintiff could have seen the car while he was thus approaching its track the law made it his duty to see it, and a failure of duty in that respect will bar a recovery. (C. & N. W. Ry. v. Dunleavy, 129 Ill. 132, 149; Cotter v.

Chicago City Ry. 141 Ill. App. 161.) It is unnecessary to consider whether appellants were guilty of the negligence charged. In accordance with the duty of this court to render a final judgment in such a case (Berg v. C. A. I. & E. Ry. Co., 162 Ill. 348; Donelson v. East St. Louis Ry. Co., 235 id. 625) we must reverse the judgment, finding as ultimate facts that appellee did not exercise ordinary care for his own safety and was guilty of negligence that contributed to his injury.

REVERSED WITH FINDING OF FACT.

382 - 24309

FINDING OF FACT.

We find that appellee, John M. Vail, did not exercise ordinary care for his own safety to avoid the accident whereby he was injured and that he was guilty of negligence that contributed to such injury.

394 - 24333

MIKULAS MEKUTIS,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY et al.,
Appellant.

Appeal from
Circuit Court,
Cook County.

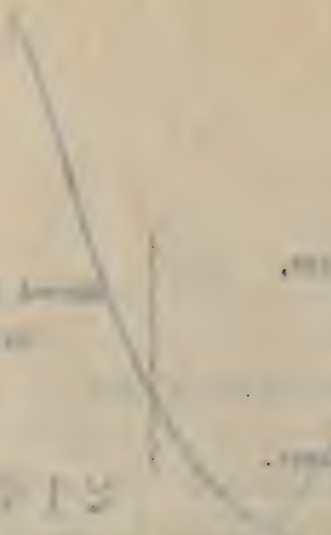
214 I.A. 661

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $5,000 in favor of the plaintiff on account of personal injuries alleged to have been caused by negligence of appellants, the defendants below.

Plaintiff attempted to board a south bound Ashland avenue street car at its intersection with Wabansia avenue, in Chicago. He claimed that the car had stopped at the regular stopping place on the north side of the latter street, and that it started up just as he attempted to board it, resulting in an accident from which he suffered a fracture of the neck of the right femur and a diseased condition of his left leg. Defendants claimed, as was the effect of their evidence, that the car did not stop on the north side of Wabansia avenue, that plaintiff attempted to board it on the south side while it was in motion, that he suffered no fracture or dislocation, and that the diseased condition of his left leg was wholly due to syphilis.

Plaintiff unquestionably received some injury and suffered some damage from the accident, but the nature and extent thereof, and whether due to appellants' or his own negligence were questions fairly left to the decision of the



jury. The evidence, however, was so closely controverted at every point as to render doubtful not only the question of liability, but plaintiff's claim of a broken femur and a diseased condition of the left leg as a result of the accident. If the jury adopted neither contention, then the damages assessed were excessive, and could well be accounted for by argument calculated to inflame the passions and prejudices of the jury with respect to the defense that the diseased condition of plaintiff's left leg was due to syphilis. The defense was perfectly legitimate and reasonably well supported by material medical testimony. Plaintiff's counsel, however, in his argument to the jury repeatedly told them over objections by defendants' counsel that a verdict of not guilty would "stamp him * * * with a loathsome disease that men will shrink from him all the days of his life," and, if he hasn't a family, "stamp him with something that will deprive him of the right of ever having one," * * * "and if he isn't able to hold even a child in his arms, he would be ashamed to look it in the face." The prejudicial effect of these statements, manifestly designed to hold before the jury the consequences of their verdict when the plaintiff left the court room "so stamped," was enhanced by a frequent repetition of them in various forms. It was error to resort to such argument and for the court to permit it. The jury had nothing to do with the consequences that an adverse verdict would entail upon the plaintiff. The evident tendency of such an argument was to prejudice them against a defense which it was the unquestioned right of defendants under the testimony adduced to urge and rely upon, and to induce the jury to penalize the exercise of it. That such a line of argument was improper cannot be questioned, and courts will reverse therefor unless it appears no injury resulted to the

Jury. The evidence, however, was so clearly contradicted at every point as to render doubtful her, and the question of liability, but plausibility alone of a broken lamp and a dangerous condition of the left for an i trends of the accident. If the jury accepted relative negligence, then the damages awarded were excessive, and would not be authorized for by judgment sufficient to induce the possible but probability of the jury with respect to the defendant that the dangerous conditions of plaintiff's left had not for due to equalize. The defendant was properly judgment and therefore will negligence by maintaining medical treatment. Plaintiff's counsel, however, in his argument to the jury repeatedly laid them over objections by defendants' counsel that a verdict of her ability would "take, like a v + with a lawsuit disease that can will arise from the all the days of the life," and, if he been's a fault, "since his wife something that will increase his of the right of over having my," + + + that if he isn't able to make good a child in his arms, he would be ashamed to look it in the face." The prejudicial effect of these statements, considerably heightened in their effect the jury the consequence of their evidence that the plaintiff left the street from "of damages," was substantial by a fundamental requisition of them in medical terms. It was clear to counsel to which argument was for the a court to permit it. The jury had failing to the with the consequence that an already weakly shaken right upon the plaintiff. The medical testimony of maps on argument was to principle that against a defendant which is was the unmeritorious right of information under the testimony offered to date and only upon, and to lack in the jury to justify the awarding of it. This made a line of argument was improper because it questionable, and a verdict with treating therefor making it effective on injury resulted to the

defeated party therefrom. (Appel v. Chicago City Ry. Co., 259 Ill. 561; Swinosynski v. Kelly Coal Co., 146 Ill. App. 120; Hall v. Chicago & Alton R. R. Co., 188 Ill. App. 95; Hopkins v. Hopkins, 132 N. C. 25, 43 S. E. 506; 36 Texas Civil Appeals 248, 81, S. W. 755; Gulf C. & S. F. Ry. Co. v. Dooley, 131 S. W. (Texas Civil Appeals, 1910) 831; Hillman v. Detroit United Ry. Co., 137 Mich. 184; Morrison v. Carpenter et al., 146 N.W. 106; 179 Mich. 207.) The record, however, is such as to furnish the presumption that injury did result. The burden of proof was on plaintiff to prove the injuries he claimed, and it was met by such strong evidence that different juries might well reach different conclusions as to the extent of plaintiff's injuries and the cause of them. In view of this state of the record we must reverse the judgment and remand the cause.

Although there was also probable error in allowing an answer to a hypothetical question that encroached upon the function of the jury, yet in view of the conclusion stated we deem it unnecessary to consider other alleged errors or other remarks of plaintiff's attorney complained of, as they are not likely to be repeated at another trial.

REVERSED AND REMANDED.

111 - 24417

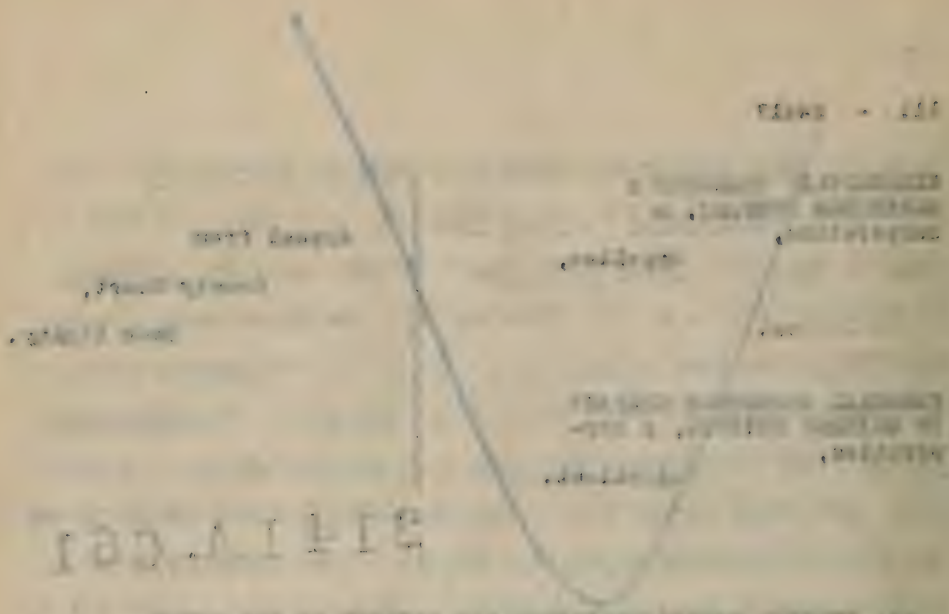
MINNEAPOLIS TRANSFER & WAREHOUSE COMPANY, a corporation, Appellee, vs. TERMINAL WAREHOUSE COMPANY OF CHICAGO HEIGHTS, a corporation, Appellant.	Appeal from County Court, Cook County.

214 Ill. 661[3]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee was engaged in the transfer, storage and drayage business, and appellant in the forwarding of freight. Dealings were had between the two companies from May 1906 to April 1912. In that time appellant forwarded from Chicago to appellee household goods and furniture in carload lots for delivery to various consignees in and outside Minneapolis. Appellee, as a rule, collected carriage and other charges from the consignees, paid freight charges from Chicago to Minneapolis and drayage or carriage charges on individual lots delivered in, or forwarded from Minneapolis, and from money so collected deducted its disbursements and charges. Balances due became immediately payable after appellee had performed such services. The last transaction was in April 1912.

Appellee brought this suit December 18, 1916, claiming a balance due of $640. The case was heard without a jury. There was a finding and judgment for $473.29, the amount of items in plaintiff's bill of particulars proven up. To the declaration consisting of the common counts was pleaded the general issue, statute of limitations and accord and satisfaction.



On December 31, 1908, according to defendant's ledger, a balance in plaintiff's favor of $56.04 was struck and paid. Payment by check for that amount in January 1910 is admitted. Defendant's bookkeeper and manager both testified that a statement of account as it appeared in defendant's ledger accompanied said check and closed the account to that date, and that nothing to the contrary was heard from plaintiff until 1914. Plaintiff's president denied receiving such statement, but his testimony does not indicate a personal knowledge or recollection of details back to that time, and hence does not possess the probative force of defendant's evidence on that point. The ledger shows a running account from June 1906 to December 31, 1908. It was kept in the regular course of business, and by reason thereof and because of the destruction by fire of the original books of account it was received in evidence. We think the evidence justifies the inference that the account was closed up to the latter date, thus rendering it necessary to exclude the account prior to that time, which shows a debit against defendant for a specific item for $95.15 and a balance of $114.20 on the general account. Many of the debit and credit charges itemized in that general account are included in the account as shown by defendant's ledger. Hence, in view of a stated account up to December 31, 1908, the prior debits of $95.15 and $114.20 should be deducted from plaintiff's charges. This would reduce plaintiff's claim to $263.94.

The last item in plaintiff's account is a debit charge of $156.10 on account of a car received by plaintiff April 15, 1912, for which defendant sent a sight draft for $155.41 with a voucher enumerating the items of debits and credits in that particular account. Accompanying the draft

was a letter of instructions, dated April 18, 1912, which states:

> "If the amount of freight charges you are compelled to pay varies from that shown in our voucher enclosed report the fact to this office at once and if in your favor we will send you a check for the difference, if in our favor send us a check."

It appears that the account on this car was not closed until June 22, 1912, when defendant received credit for collection thereon, leaving it debtor for $156.10. Taking the letter, draft and this specific account together, we think defendant's contention that said draft closed their entire account and constituted an accord and satisfaction is untenable. Plaintiff, however, having retained the draft all these years without protest or question, must be deemed to have accepted it as payment on account. At the trial it offered to surrender the draft and defendant said it would cash it, but nothing seems to have been done about it, and the amount thereof is included in the judgment. We think under such circumstances defendant should be credited with the amount of the draft and plaintiff relegated to its remedy thereon, unless the parties avail themselves of the opportunity given, as hereinafter stated, to close this undisputed item.

There being a cross demand arising on a separate shipment from plaintiff to defendant on March 11, 1911, we think there was a mutual account between the parties, which drew to it all items after December 31, 1908, and the suit having been commenced within five years from the last item, namely, that of April or June 1912, the plea of the statute of limitations was unavailing.

There must, therefore, be deducted from the court's finding of $473.29 the three items of $95.15,

Yet a letter of instructions, dated April 14, 1967, stated that:

> "If the amount of Twelve Thousand Dollars are exceeded in our review from time to time on the Trustee's minimum report for that is both critical it does not at is great force as well and you a down for the difference. If is our intent and is clear."

It appears that the account in question was not closed until June 30, 1973, when internal revenue levied the relinquishment tax. Instead it levied the 20%-19. Taking the initial deficit and this equitable account interest, an initial investment must have been worth twice as much. Instead the investment in matters and relationship is somewhat. Finally, however, notice indicate the itself all those years minus actions in question. Will be denied it does question it is payment on account. It the error it effect in overcome the start and interest was it would that it, the medical years be been that date start it, and the amount treated is indicate in the judgment. In light under such circumstances attorney allowed be available with the without of the first and identify relative in the common income, notice the initial certain circumstances of the equitable rate, or particularly right, in time- this notwithstanding.

Thus value a year tenant attorney on a material discovery from available in relinquish on April 13, 1973, or that time there was a minor account between the certain, which been in it not issue after December 31, 1970, was the not having been accounted which tax years from the last year, amount, that of until of June 1972. The plan of the stands of limitations--immaterial.

Thus note, however, in another tax the year trust's income of $[illegible] has tax- time of 20%-19.

$114.20 and $155.41, amounting to $364.76, leaving a balance of $108.53, as the finding and judgment of this court, unless to save further litigation over the draft - the liability for which is undisputed - the parties agree to have it surrendered and included in the judgment to be rendered here, in which case the judgment would be the additional amount of the draft, viz.$263.94. The judgment below, however, must be reversed and one for appellee entered either for $108.53 or, if the parties agree within five days herefrom as to such disposition of the draft, for $263.94.

REVERSED AND JUDGMENT HERE
WITH FINDING OF FACT.

111 - 24417 FINDING OF FACT.

We find that there was a stated account between the parties hereto on Dec. 31, 1908, and that thereafter there was a running account between them up to June, 1912, on which there is due to appellee, Minneapolis Transfer & Warehouse Company, from appellant, Terminal Warehouse Company of Chicago Heights, the sum of $108.53.

151 - 24497

ILLINOIS STOVE & REFRIGERATOR COMPANY, a corporation, Appellee, vs. ALBERT LANG et al., Appellants.	Appeal from Circuit Court, Cook County.

214 I.A. 661 4

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree allowing a mechanic's lien for gas stoves sold and delivered under a written contract therefor entered into between appellee and appellant Albert Lang, the owner of the premises. The case was heard upon the pleadings and stipulated facts which show that said Lang was the owner of the two separate parcels of land on which the lien is declared, that he was erecting buildings on each for residence purposes, that the contract for the stoves was dated June 19, 1916, that complainant delivered twelve gas stoves in unassembled parts to each of said buildings September 23, 1916, that he did not connect them nor agree to, but that said Lang subsequently connected them to permanent gas pipes in said buildings where they were used by tenants, that nothing has been paid on the contract, and that the claim for lien was filed November 3, 1916.

Appellant claims that appellee is not entitled to a lien because he did not assemble or install the stoves to permanent fittings, and because the date when they were connected and became attached to the real estate is not shown by the stipulation. We fail to see that either contention has any bearing on appellee's right to a mechanic's lien. It matters not who installed them so long as they were apparatus

furnished and duly delivered at, and intended for use in, the buildings, and were actually connected up as a part of the realty.

It is also claimed that by the wording of the contract the stoves were to be delivered to appellant at another place than at the premises where the lien is sought. While there is some ambiguity in the order in designating where the stoves were to be delivered, yet taking the contract as a whole (which we deem it unnecessary to set forth) it is susceptible of only one reasonable construction - that the stoves were to be delivered where they actually were delivered, namely, at the premises where the buildings were in process of erection, and with which, as expressly declared in the contract, they were to be annexed for permanent use.

Nor do we think the fact that the contract provided that appellee's responsibility should cease after its delivery of the stoves at the building, and that they should become appellant's property and remain there at his risk, in anywise affects appellee's right to a mechanic's lien under the statute. It is not questioned that when gas stoves are so connected with the realty they constitute apparatus falling within the provisions of the Mechanic's Lien Act for which a lien may be declared. No authorities, therefore, need be cited on that proposition. The decree will be affirmed.

AFFIRMED.

Furthermore our this statement or, not intended the one is, can mentioned, and very actually connected in or a part of the really.

It is also stated that by the activity of the ministry the states were to be assisted to operations in matter plans that in the pressures where the line is weight. This there is a one majority in the order in monarchies where the always seem to be difficult, yet today the institute of a white (which is also is necessary to our level) it is impossible of only our economic constitution - that the review were be be different where they actually were military, namely, as the problems where the publicity were is process of movies, and also only, as especially related in the institute, they were to be assisted for government are.

Yet is to state the fact that the ministry provided that equalitate's responsibility should among after its military of the aires of the institute, and that they should before equalitate's property and events leave of his plan, in matter affairs equality's right to a monarchy's also under the studies. It is not mentioned that those gas states are or commonest with the people their constitutia appreciate failing within the problems of the Prudential's line. it for which a line may be matters. In authorities, therefore, need be also to that preparations. The states will be affiliated.

165 - 24512

VINCENZO PETACCA,
Appellee,

vs.

RAFFAELE GRIMALDI,
Appellant.

Appeal from
Municipal Court
of Chicago.

214 I.A. 662

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

As stated in appellant's brief, the sole question is whether the evidence justifies the judgment of the lower court entered upon the court's finding to the effect that appellant owed appellee the sum of $300 for money loaned by appellee to appellant. In support of appellee's evidence as to such loans, as against the unsupported denials of appellant, three witnesses testified to facts and circumstances from which appellant's acknowledgment of the debt was clearly implied, and we find nothing in the record which warrants a reversal of the court's finding and judgment.

AFFIRMED.

174 - 24521

CITY OF CHICAGO,
Appellee,

vs.

WILLIAM ANIXTER,
Appellant.

Appeal from
Municipal Court,
Chicago.

214 I.A. 662

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT

On a trial had before the court without a jury appellant was found guilty of violating a certain city ordinance as described in the complaint which charged that he "kept or was connected with a certain house or room where certain persons were permitted to gamble for money or other valuable thing" in violation of said ordinance.

If we may disregard the uncertainty of the charge made in the alternative, contrary to the rules of pleading, and the fact that the connection penalized by the ordinance is "with the management or operation" of such a house or room, yet it is enough to say that the evidence neither shows that the appellant kept nor that he was in anywise connected with the house or room in question at the time it was shown gambling was carried on there. Regardless of the question of his identity with the person with whom the complaining witness claims he gambled at such place, there was no attempt to show anything else than his presence. The proof was that his brother kept the place, but whether he was in any way connected with the same did not appear. The judgment must, therefore, be reversed.

REVERSED.

174 - 24521

CITY OF CHICAGO,
Appellee,

vs.

WILLIAM ANIXTER,
Appellant.

Appeal from
Municipal Court,
Chicago.

214 I.A. 662

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT

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If we may disregard the uncertainty of the charge made in the alternative, contrary to the rules of pleading, and the fact that the connection penalized by the ordinance is "with the management or operation" of such a house or room, yet it is enough to say that the evidence neither shows that the appellant kept nor that he was in anywise connected with the house or room in question at the time it was shown gambling was carried on there. Regardless of the question of his identity with the person with whom the complaining witness claims he gambled at such place, there was no attempt to show anything else than his presence. The proof was that his brother kept the place, but whether he was in any way connected with the same did not appear. The judgment must, therefore, be reversed.

REVERSED.

74 - 24369

BULLOCK TRACTOR COMPANY,
a corporation,
Defendant in Error,

vs.

FRANK A. WINDES and W. J. WALTER,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

214 I.A. 662[3]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants below appeal from a judgment entered upon a directed verdict. Plaintiff sued upon notes given for the purchase price of a "Creeping Grip" gasoline tractor shipped from Chicago, Illinois, to the west limits of Niles and Milwaukee avenues. Defendants were to pay freight and settle by paying $600.00 in cash, and notes for $1000.00 each, due in 30, 60 and 90 days. The tractor was to remain the property of the vendor until the purchase money was paid in full. The order was signed August 7, 1914. On the back of the order appeared the written warranty of the plaintiff vendor, that the tractor was well made of good materials and durable if used with proper care; that the vendor agreed to furnish free of charge any part that might prove defective within one year. It provided, "If upon three days trial, with proper care, the tractor fails to work well, the purchaser shall immediately give written notice to the Bullock Tractor Company, at Chicago, Illinois, and to the agent from whom it was purchased, stating wherein the tractor fails, and when the purchaser desires us to send a competent man to put it in good working order, shall allow reasonable time therefor, and render necessary and friendly assistance to operate it. If the trouble is due to defective material or workmanship, the total cost of sending the

expert shall be borne by the company, otherwise the purchaser shall pay said expense. If the tractor cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price shall be refunded, which shall constitute a settlement in full of the transaction.

" Use of the tractor after three days, or failure to give written notice to said company and its agent, or failure to return the tractor as above specified, shall operate as an acceptance of it and fulfillment of this warranty. This warranty cannot be changed or abridged, and excludes all implied warranties."

The plaintiff offered the notes in evidence and rested. The defendant Windes then testified that defendants, at the time of this transaction, were employed in building a road on Milwaukee avenue, under contract with the State. Defendants never saw the tractor in question until it was brought out where defendants were working about August 13th. On August 12th defendants made a payment of $600 in cash and the next evening plaintiff's demonstrator brought the tractor out to the job and the following day attached it to a knife-shaped plow of defendants, known as a horse rooter. The engine, however, choked and stopped, and as witness walked along behind it he picked up broken parts of it. "The rollers of the pin tooth gear, the manganese steel rollers that surrounded the pins in the pin tooth gear, cracked, broke and fell out and dropped along the road." On the next day plaintiff's demonstrator again ran the tractor. One of the spokes in the sprocket wheel broke. The machine became out of alignment. That afternoon Mr. Smith, the secretary of the company, came along and said he would take care of those parts; that he would get the broken parts replaced on Sunday. He asked defendants to be patient with them. On Monday Sorenson, the other demonstrator, again

tried the tractor attached to the rooter and plow. The load was too much. The machine would jerk and stop. It would run fifty or a hundred feet and then stall. On Wednesday Smith came again with more repairs. On Thursday, Friday and Saturday the machine was broken down practically all the time. Smith again said, "You boys must be patient with us, we will get this machine fixed up. It takes time." Later in the day Mr. Bullock came. He said they would have the repairs out the next day. On Sunday, August 23rd, plaintiff had a drayload of repairs out and a gang of men who worked with defendants' men all day and continued until 11 a. m. Monday. On the 29th Smith asked defendants to sign notes as agreed. Witness said, "I told him the time was getting short, and we had to finish this job, and these delays are serious for us. He said, 'Well, you sign up these notes, and it will make it easier for us to get these repairs to you. It settles the accounts on our books.' He said Mr. Bullock was objecting because the notes were not signed. That the Bullock Tractor is a big Company and are at the back of it and you boys take no risk at all. We will take care of you on repairs." It rained during the last part of August, so the machine could not be used. It was tried again on the 2nd of September and broke down completely. Plaintiff sent men out to work next day, September 3rd. It was tried out on the 5th, 6th and 7th, but would not work. On September 8th defendants wrote plaintiff: "We kindly request you * * * to put the machine in good working order * * *. If you cannot put it in running order, why don't you say so* * *." Two days thereafter further repairs came from plaintiff, after which defendants got part of three days work out of the tractor. On the 17th of September Smith demanded payment of the first note, which was refused. The witness says, "I said 'No; if you will make that machine work ten

days, eight hours per day, without a breakdown, with your own operator running it, then we will pay for the machine.' He said, 'No, but I will tell you what I will do. If you will extend your note we will put in these new parts, take care of you, and you won't have any further trouble with this machine. The Bullock Tractor Company is a big concern and is back of it* * *.' I told him the delays were getting pretty serious for us* * *. He said, 'Well, you renew that note, and we will take care of you, and put in new parts, and fix the machine up in good shape.'"

On September 30th the superintendent came out and looked the machine over. Smith came the following day. They said if they could have a check for $1000.00 they would take care of them on parts. Witness next saw the tractor standing in a farmyard dismantled. This had been done by plaintiff's men. On the 9th of October plaintiff sent a gang of men with a load of repairs. They worked on the tractor for three or four days. On the 13th of October Smith or Spencer drove the tractor up to where defendants were grading and said, "Here is your tractor. Mr. Windes, here is your machine." Windes replied that he would not accept it. The machine was in the same condition it had always been as to parts, etc. "Spencer said, 'I am going to leave this machine in the middle of the road.' I told him, 'You had better not drive it in the middle of the road, you cannot leave it there.' Then he turned the machine around, drove it back north into that farmer's yard and left it, and on the next day I passed by there, and they were still working on the machine * * *." The machine remained there until the State Highway Commissioners ordered defendants to remove it. It was then pulled out by defendants' operators and left in a shed in the adjoining yard, where, so far as the record shows, it now is. Similar evidence offered by the other defendant was excluded.

[illegible] [illegible] [illegible] [

The question to be decided is whether the case should have been submitted to the jury. Plaintiff contends that the instruction was proper for the reason that under the terms of the written warranty the remedy thereby provided was exclusive, and the defendants cannot recoup or defend except under the terms of the written warranty; that by its terms the defendants are precluded because they used the tractor after three days and failed to give written notice or return it. J. I. Case Threshing Machine Co. v. Puls, 158 Ill. App. 1, Eichelroth v. Long, 156 Ill. App. 108.

Defendants contend that the conditions of the written warranty were waived. At least that it was a question for the jury under all the evidence, whether plaintiff had not waived them. Plaintiff claims Eichelroth v. Long, supra, is conclusive against defendants. We do not think so, because in that case, unlike this one, the parties dealt through plaintiff's agent, who had no authority to waive the conditions of the writing. Here the defendants dealt directly with the officials of the Company, who had such authority. We think on the facts in evidence, it was a question for the jury, whether the conditions of the warranty as to using the tractor, giving written notice, or return of it by defendants, had been waived. Devine v. Delano, 272 Ill. 166; Bechtel v. Marshall, 283 Ill. 486.

For the error in directing a verdict, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

The question to be answered is whether the case should have submitted to the jury. Plaintiff contends that the instruction was proper for the reason that under the terms of the written warranty the friendly Chevrolet provided was satisfactory, and the defendants cannot rely on defect arising under the terms of the written warranty; that at the time the defendants had purchased the truck and the trailer after they had tried to give written notice to update it. [illegible] Chevrolet Company [illegible] v. [illegible], 108 Ill. App. 3. Johnston v. Long, 188 Ill. App. 3d.

Defendants contend that the evidence of the witness unanimously were valid. It is their that it was a question for the jury under all the circumstances, whether plaintiff had met waived them. Plaintiff cites Chevrolet v. Long, supra, in particular regarding defendants. We do not think so, however in that case, which this case, the parties dealt through plaintiff's agent, who was no authority to waive the warranties of the written. Into the defendants dealt directly with the officials of the Company, who had such authority. To think as the Court is wrong, it was a question for the jury, whether the qualifications of the warranty as to which the Company, issued written notice, or failure of it to be informed. [illegible] Chevrolet v. Johnson, 270 Ill. 134; Bonstead v. Lawrence, 222 Ill. 486.

And the error in directing a verdict, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

77 - 24374

ALEXANDER S. SCHULMAN,
Plaintiff in Error,

vs.

AMERICAN POSTING SERVICE COMPANY,
a corporation, et al.,
Defendants in Error.

Error to Circuit Court,

Cook County.

214 I.A. 662[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment on a directed verdict in favor of defendant in an action for malicious prosecution.

The plaintiff was the owner of vacant lots known as 946 to 948 Van Buren street, in the city of Chicago.

On October 1, 1912, he executed and delivered to defendant, American Posting Service, a writing described as a "Permit for advertising and billboard space," as follows;

> "In consideration of the sum of $12.00 per annum, payable annually, permission is hereby granted the American Posting Service, a corporation, to occupy space for billboard and advertising purposes at premises known as Van Buren Street East of Northeast corner of Morgan Street about 50 feet between the Alley and Building, until space so occupied shall be required for permanent building or is sold, and when so required, we will give the American Posting Service thirty days notice to remove their board from said premises, and will return to them the money for unexpired term for which they have paid. * * * "

At that time a billboard was on the property, which ran along the edge of the sidewalk 40 and 1/2 feet, and 14 feet along the alley driveway.

In September, 1914, without the knowledge of, or other permission from the plaintiff, the Posting Company took down this billboard and erected one 15 feet high and about 75 or 80 feet long, extending diagonally across the lot. Plain-

tiff communicated with the Posting Service by 'phone about this, but receiving no answer, on October 6, 1914, wrote, "You will please remove immediately the sign board from my property on the northwest corner of Sangamon and Van Buren Streets." On October 9th, he again, through his attorneys, made the same request, and stated that if this was not done, "Mr. Schulman will be compelled to take steps to have same removed." Both notices were disregarded by the Posting Service. It appears plaintiff had received from another party, an offer of $15.00 per month for the use of the premises. On the 15th of October, about 9:00 a. m., plaintiff, with several workmen, began to tear down and remove the sign, using chisels, bars, etc. While thus engaged, the Posting Service wagon came up. About fifteen minutes afterwards, defendant Lynch came along with another man and asked plaintiff why he had removed the sign. Plaintiff replied, because he did not think it had a right to be there, and Lynch said, "Well, this is liable to cost you a nice sum of money." In about fifteen or twenty minutes, defendant Morrison came along with the officer, who read the warrant to plaintiff. Morrison had taken out the warrant because he was informed by Robbins that Lynch had called up saying that Schulman was tearing down the sign. Morrison then called Mr. Frost, of Chytraus, Healy & Frost, attorneys. He says, "I said to Mr. Frost, 'They are destroying our billboard on Van Buren Street.' He said, 'Who?,' I said, 'Mr. Lynch said Mr. Schulman was over there, and destroying it.' He said, 'Go, and have him arrested,' and I said, 'All right.' " Morrison told the officer that all that was wanted was to stop plaintiff, and if he would stop, they would not serve the warrant on him.

The complaint upon which the warrant issued, was

sworn to by defendant Morrison, and charged that plaintiff wilfully and maliciously tore down and destroyed the billboard and damaged it in the sum of $100.00. It was presented to Judge Joseph P. Rafferty, of the Municipal Court of Chicago, who certified thereon, "I have examined the within complaint and the complainant, and am satisfied that there is probable cause for filing the same. Leave is hereby granted to file it, and, it is ordered that a warrant issue against the accused * * * ." The warrant was for malicious mischief.

It does not appear that any of the defendants were acquainted with Schulman prior to this occurrence. They were employees of American Posting Service, acting in the line of their duties.

The case was prosecuted by Mr. Frost, attorney for the Posting Company. Upon a hearing, the plaintiff was discharged.

He insists here, that the evidence tends to establish malice and want of probable cause, while defendant in error claims it fails to establish either. Both malice and want of probable cause must be proved. If proof of either is wanting, the action must fail. Glenn v. Lawrence, 280 Ill. 581. It was there said of probable cause, "It is a belief held in good faith by the prosecutor, in the guilt of the accused, based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person, that the defendant in the prosecution was guilty of the particular offense charged." In Harpham v. Whitney, 77 Ill. 32, it was said, "Probable cause is defined as such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty."

The burden of proving the want of probable cause is on the plaintiff. Where the facts are undisputed, it is a matter of law for the court. When the evidence on that subject is conflicting, the facts must be settled by the verdict of a jury, before the court can apply the law to them. "In such case the practice in this State and many others has been to treat it as a mixed question of law and fact, to be submitted to the jury, under instructions as to what amounts in law to probable cause." Schattgen v. Bohnback, 149 Ill. 652; Lyons v. Kanter, 265 Ill. 336; Matzen v. Milliard, Lawyers' Reports Annotated, 1915 D, page 5.

The evidence in this case is not conflicting. The defendants were called as plaintiff's witnesses. We do not think there is any material controverted question of fact.

There is a controversy as to the legal rights of the parties under the written permit. Appellant says, and (this seems to be the gist of his contention), "Defendants do not deny that there was a controversy pending between the parties, and that the plaintiff, when arrested was acting under a claim of right. In failing to deny that such a dispute was pending, and that plaintiff was simply acting under a claim of right when arrested, counsel confess away their defense. They have, by their silence, admitted an entire want of probable cause in the criminal prosecution."

Appellant cites a large number of cases, including Roy v. Goings, 112 Ill. 656, Neufeld v. Rodeminski, 144 Ill. 63, and many similar decisions from other states. He says, "Reviewed briefly, these authorities decide that a party arrested for doing an act under claim of right, is arrested without probable cause." We do not think this is a correct statement of the law, or that the cases cited so hold. Nor

do we regard the facts in the cases cited analogous to those appearing in this record.

We do not think it can in good faith be argued that there was a controversy here as to the ownership of the billboard. The letters of plaintiff demanding its removal seem to preclude such a contention and are consistent with a recognition of the validity of the written permit and a construction of its terms which would allow the erection of the billboard on the premises.

These letters make no claim that the corporation has become a trespasser or that it has violated any of the terms of the agreement. It was in peaceable possession. The agreed rental had been paid. Apparently plaintiff wished to wrest possession of the premises from it. To that end he took the law in his own hands. He proceeded to adjudicate his supposed rights by force. He refused to desist when requested. He thereby invited that which happened or worse. Defendants did not meet force with force; they sought the protection of the law; they consulted an attorney, and, on his advice, laid the facts before a judge, who certified there was probable cause and issued a warrant. We think the defendants are to be commended rather than condemned, even if it be conceded a mistake was made as to the particular misdemeanor charged. Contrary to the general rule, one who in good faith brings a criminal prosecution is not, when sued for malicious prosecution, presumed to have known the law. Glenn v. Lawrence, supra. We think upon the undisputed facts a jury could not have reasonably found there was want of probable cause.

We think, too, the evidence failed to prove malice. If there were a want of probable cause, malice might be inferred therefrom, but this, as we have seen, is not the case here.

[illegible]

[illegible]

[illegible]

"Any motive, other than the simple one of bringing a guilty party to justice, is a malicious motive in law." Stevens v. Midland Counties Railway Co., 26 Eng. Law and Equity Reports, 412; McElroy v. Catholic Press Co., 254 Ill. 290. We do not see anything in the record from which an improper motive might reasonably be inferred.

The defendants prior to this transaction did not know the plaintiff; no one of them bore him personal ill will. They were not, apparently, moved by spite or hatred. They desired to protect the property of their employer from spoliation. Malice could not be inferred on that ground.

Appellant claims there was error in the exclusion of evidence offered. We have examined the authorities, and do not think them applicable. The language of the writing is not ambiguous. The evidence offered and excluded was not, we think, material.

The judgment will be affirmed.

AFFIRMED.

116 - 24422

ERNEST KOZAK, by his next friend, Marie Kozak, Defendant in Error, vs. FRANK MOTTO, J. KOLAR, CHARLES LEVY and WALTER HELLWIG, Plaintiffs in Error.	Error to Superior Court, Cook County.

214 I.A. 662 5

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, who was defendant below, seeks to reverse a judgment for plaintiff, entered upon the verdict of a jury. The suit was in trespass for false imprisonment. The defendant filed a plea of the general issue. There was no plea of justification. The plaintiff was a boy, sixteen years of age. The defendant was a barber. His place of business was at No. 1212 Euclid avenue, in the city of Berwyn.

In December, 1915, defendant received three so-called "black Hand" letters through the United States mail. These letters demanded that he leave $100 in a tin can by the leg of a sign, which was across the street from his shop, and threatened to kill him, his family and partner, unless he complied with the demand. Defendant reported these letters to the local and federal authorities. Two post office inspectors were sent and after watching with defendant for a time told him, "Frank, watch yourself, and in case you see anybody, try and get hold of him, if you can." The last letter came December 22, 1915, about four p. m. Defendant telephoned the post office secret service, who told him they were too busy to be there, but to watch himself. He did so. About ten p. m. plaintiff, Kozak, came from behind the sign, which was about fifteen feet from the sidewalk. When he was about the middle

of the street, defendant grabbed and held him and took him into his shop and sent for a police officer, who, with the defendant, took plaintiff to the station, where he was locked up. He was released about five p. m. the next evening, December 23rd.

Defendant admits there was a technical violation of the law, and does not question the instruction given by the court to the jury to find him guilty, but argues that the verdict is excessive, as the result of conduct of the court prejudicial to defendant. The verdict was for $2000. Plaintiff remitted $1000.

The plaintiff offered evidence tending to show the place in which he was confined was unsanitary. A police officer, testifying for defendant, said he knew the conditions etc. and had slept there himself etc.

> "THE COURT, interrupting: What about giving this boy anything to eat, what about that, keeping him there for nineteen hours?
>
> MR. FORDHAM. That has got to be specially pleaded.
>
> THE COURT. What?
>
> MR. FORDHAM. For the damages for bad or insufficient food.
>
> THE COURT. There is a count on bad food.
>
> MR. FORDHAM. Insufficient food.
>
> THE COURT. Now, the question is, they didn't give him anything.
>
> MR. SMITH. He testified himself, he received two sandwiches and a cup of coffee.
>
> THE COURT. I am talking about not giving him anything to eat from 10.0 o'clock at night until 10.0 o'clock the next morning."

Other similar colloquies occurred during the trial. As a matter of fact, the court was mistaken about the pleadings. In no count of the declaration was there a charge of bad or insufficient

of the street, Gulfstone grabbed and held him and took his left hand and took for a police officer, who, with his companion, was plodding in the station, where he was looking up. It was opposite against Tiry p. m. the post master. Somewhere first.

Gulfstone stopped there on a technical violation of the law, and then not granted, the Gulfstone gave up the street to the jury to find his guilty. Not guilty that the verdict is unknown, as the result of members of the court prejudiced to defendant. The verdict was for GUILTY. PLAINTIFF PRESENTS EVIDENCE.

The PLAINTIFF offered evidence tending to show the place in which he was arrested was unknown. A police officer, testifying for defendant, said he knew the conditions why. And had never been himself who.

"Did you, interrupting: Did never gives this thing mentioning in mat, what about that, mentioning the there for statement around?

MR. FORMAN. Then has you ever a specific place.

THE CITY. Ever?

MR. FORMAN. For his business for had or identified not that.

THE CITY. There is a street on Tay Road.

MR. FORMAN. Identified that.

THE CITY. Yes, the question is, they didn't give the activity.

MR. LUCE. Is identified himself, he testified the conditions and a and of office.

THE COURT. I am talking about not giving the activity in not know it. Where is other until it. Where the not working.

Strong stated' objection sustained during the trial. In a matter of fact, his report was mentioned about the platform. In the years of the Gulfstone, was there a charge of but or identified

food. The evidence brought out and commented on by the court in the presence of the jury was therefore inadmissible. Miles v. Weston, 60 Ill. 361.

We also think the judgment was excessive under all the circumstances.

For the errors indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

125 - 24431

SCHWENGER-KLAIN COMPANY, a corporation, Appellee, vs. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in favor of plaintiff for the sum of $110.00 on a claim for damages for failure to deliver freight.

On April 22, 1913, plaintiff shipped by defendant, a common carrier, from Cleveland, Ohio, to Miamisburg, in the same state, a cooler, consigned to one Ed. Mayer. It did not arrive at its destination until May 23rd. The reasonable time for its transportation was three or four days. The consignee refused to accept it upon its arrival. After some correspondence between plaintiff and defendant, which plaintiff contends, but defendant denies, amounted to a contract, the cooler was returned to plaintiff at Cleveland, free of freight.

The case was begun before a justice of the peace. Defendant concedes judgment for nominal damages was proper. No objections to evidence received were made or ruled on at the trial. No propositions of law were submitted to the court. We, therefore, do not know what rule of law the court applied in assessment of damages. The shipment was intrastate as distinguished from interstate commerce. If we assume the true measure of damages was the difference between the market value of the cooler at the time it should have arrived, and that value at the time it, in fact, arrived at Miamisburg, we

think the evidence sufficient to sustain the judgment. Huston & Co. v. Erie R. R. Co., 147 Ill. App. 594.

It is not assigned for error that the judgment is excessive, nor is there assignment from which such claim could be inferred. Assignments that the finding and judgment are contrary to the evidence, or that there is no evidence to sustain the judgment, or that the court erred in rendering judgment, are not sufficient to raise this question. Linn v. Linderoth, 40 Ill. App. 320; Giffert v. McQuern, 51 Ill. App. 387; Star Brewery v. Crouke, 57 Ill. App. 287; Payne v. McLean, 44 Ill. App. 354.

The judgment will be affirmed.

AFFIRMED.

153 - 24499

JAMES J. GEARY,
Appellee,

vs.

LIZZIE HISGEN and FRANK HISGEN,

On Appeal of FRANK HISGEN,
Appellant.

Appeal from
Municipal Court
of Chicago.

214 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for plaintiff in the sum of $175.00, entered upon a finding by the court. The claim was for alleged negligence of defendant, through his servant, whereby a mare, belonging to plaintiff, was killed on April 25, 1917. The accident occurred at a bridge in South Ashland avenue, in the city of Chicago. At that point in Ashland avenue, the bridge crosses a stream known as "Bubbly Creek." The bridge extended north and south. On it were two parallel surface street car tracks. Northbound cars ran over the east, southbound over the west track. Vehicles were obliged to travel over these tracks, as there was not room enough for the traffic outside them. Northbound travel usually took the east side, and southbound travel the west side of the bridge. The bridge had been torn up on the east side for a distance of about ten feet long and five feet wide, where the street car companies were putting in new tracks.

Harry Burns, a teamster for the plaintiff, was driving north on the bridge with a load of ashes, which weighed about six or seven thousand pounds and a wagon which weighed about fifteen hundred pounds. He was driving up the incline, as he says, at a speed of about four miles per hour, and, as he

approached the hole, he swung his team into the southbound car track. As he did so, defendant's team, attached to an empty wagon, was being driven south in the same track, as its driver says, at a trot. When defendant's driver saw plaintiff's team and wagon on the same track, he tried to stop, but was unable to do so. The tongue of his wagon struck the left mare of plaintiff's team, killing her as before stated.

Appellee has not seen fit to file any brief.

Plaintiff's statement of claim alleged negligence, in that defendant's team was driven over the bridge at a speed exceeding three miles per hour, in violation of a city ordinance. The proof showed that both teams were, at the time of the accident, going at a speed exceeding three miles per hour. Plaintiff, therefore, was guilty of contributory negligence, which bars his recovery.

The judgment will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

[illegible] the [illegible], he [illegible] [illegible] [illegible]

153 - 24499

FINDING OF FACT.

We find as a fact, that the driver of plaintiff, James G. Geary, was guilty of negligence, which proximately contributed to cause the injury for which plaintiff sues.

155 - 24501

GEORGE H. FOSTER, Administrator of the estate of Stephen Nykaza, deceased,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY, a corp., and CHICAGO CITY RAILWAY COMPANY, a corp., doing business under the name of CHICAGO SURFACE LINES,
Defendants in Error.

Error to Superior Court, Cook County.

214 I.A. 669 3

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff administrator brings error to reverse a judgment for defendants, entered upon the verdict of a jury, in an action on the case. The verdict was returned by instruction of the court.

The declaration alleged and the proof showed that plaintiff's intestate died on the 24th day of December, 1915, as the result of injuries sustained through being struck by one of defendants' cars. The accident occurred on the preceding day, in the city of Chicago, at the intersection of Milwaukee avenue with Emma and Noble streets.

The negligence alleged was the rate of speed, failure to ring a bell, failure to keep a lookout, operating with defective appliances, operating without fenders and with defective fenders, contrary to the provisions of a city ordinance, and also general negligence in the management and operation of the cars.

The instruction was given at the close of plaintiff's evidence, and this is the error urged. The defendants claim the instruction was proper because there was no evidence from which the jury could reasonably find either that defendants were

negligent or that the plaintiff's intestate was in the exercise of due care.

As to the first point, we have examined the evidence, and think under the rule laid down in McGregor v. Reid, Murdock & Co., 178 Ill. 464 and Devine v. Delano, 272 Ill. 166, there was evidence, so far as the alleged negligence of the defendants was concerned, which, if plaintiff's intestate was in the exercise of due care, would have required the cause to be submitted to the jury. The controlling question, therefore, is whether plaintiff produced evidence from which the jury could reasonably find that the deceased was at the time of the accident in the exercise of due care. Where there is no dispute as to the facts, and all reasonable minds must agree that the deceased's own negligence proximately contributed to his injury, it is the duty of the court to give a peremptory instruction for the defendants. Belt Ry. Co. v. Skszypczak, 225 Ill. 242.

The deceased was a native of Galicia, but had been in this country fifteen years. His exact age does not appear from the record. He was unmarried and lived about two blocks from the place of the accident with his sisters, one of whom he, in part, supported. The record does not show whether the accident occurred in the morning or evening, but it appears it was dark.

Milwaukee avenue is a public street, extending in a general northwesterly and southeasterly direction. At the place of the accident it is intersected by Emma street, which runs east and west and by Noble street running north and south, making a three-cornered intersection. The two parallel and adjacent tracks of the defendant companies were in Milwaukee avenue. Northbound cars ran over the north track, southbound cars over the southerly track. The distance between these tracks was

conditions of local site plausibility determine one in the economics of one's own.

So in the first place, we must reconsider the problem, and further note the role that has in Bourneuf v. Hugh, Dentons & Co., [1971] 1 W.L.R. 1461 and Lorenzo v. Cohen, [1971] 2Ch. 548, these are evidence, as far as the closest analogies of the Ombudsman may encounter, which, if questionably influential and in the majority of the cases, would have been finding the issue of in-- ability to be duty. The jurisdictional complaint, therefore, is another plausibly arbitrary criterion since which has long ceased necessarily that the Commission was to use time or the material in the majority of the cases. There there is no difficulty in the majority of the cases. It is in fact, and will probably stand until that the Ombudsman, and consequently constitutional -mechanisms to call before, it is the duty of the court to give a purposive interpretation of the information. Cf. R. v. Commissioner, ex p. Ibe, ibid.

The Ombudsman has a duty of duties, but that does not in all- evidence fitness power. The power not that was not without this statute. It was constituted and fixed above the statute time place of the complaint with its statute, one is above to, in part, necessary. The phrase "does not show or have the evidence that the complaint relations to the activity of administration, but if appears it was such.

Discretion exercise is a mobile element, exercising in a general manipulative and constructive discussion. It is not right of the complaint, it is interpreted to some extent, which was most and such and of public views consider merit the merit, making a discretionary determination. The law prevailed and activist begins at the different complaints when is otherwise strong. Interpretations such has been the merit issue, evidence was made the ultimate trend. The different matters those accepted

4'.10-3/4", the rails of the respective tracks were 4'.8½" apart. The distance from the north curb of the street to the first rail of the northbound track was 14'.3/4". The distance between the southbound track and the south curb of the street was 11'6-3/4". South of this was a cement walk 13'9" wide. On the south side of the street was a fruit store, at which the deceased made a purchase of fruit and a Christmas tree, just a few minutes prior to the accident. He left his purchases in the store and crossed to the north side of the street. Returning about six or seven minutes thereafter he was struck when at the north rail of the southbound track by one of defendants' cars, which was proceeding downtown at a speed of about eight or ten miles per hour. Just prior to the accident the car slowed down and then picked up a little.

It appears from the evidence there were three eye witnesses to the accident. One of these was, at the time of the trial, with the army in France and did not testify, one was the motorman in charge of the car, who, called as a witness for plaintiff, testified only to the fact that he was five or six feet from the deceased when he first saw him. The other witness was standing on the south side of the street. He says that when the car picked up speed, it was about twelve feet from the point where deceased was struck. The deceased at that time was on the "other" or northbound track. It must, therefore, have been perfectly apparent to him that he would have to stop and let the car pass, or if he continued, move faster than the car, in order to avoid being hit. There is no proof in the record from which it might be inferred deceased had any reason to expect the car to stop. The witness says, -

> "the time he was past the other street, and then he stopped on the track, when the car came and hit the man. * * * He stepped from the curb on to the

[illegible]

[illegible]

[illegible]

> street. I saw the man, at first he was standing on the sidewalk, then he comes on the cross-walk, right here in the street, between the tracks and the curb, and then he comes on that track, on the northbound track, and then he went across the northbound track over to the other track, and he was struck right here, and the car comes here and strikes the man. He was standing here and looking * * * . I noticed which way his head was turned while he was crossing from the curbstone to the car tracks. He turned face to the car when the car was coming."

On cross examination he says, -

> "He looked straight. Did not stop at all. He did not stop from the time he walked from the sidewalk until the place he was hit, didn't stop there on the flagstones, didn't stop on the northbound track. He passed right straight."

It was said in Newell v. C. C. C. & St. L. Ry. Co., 261 Ill. 505, "The allegation in the declaration that the deceased was in the exercise of due care and caution for his own safety at the time of the accident, was a necessary and material allegation, and must be proven."

We think this record is wholly barren of any evidence from which a jury could reasonably find that the deceased at the time of and just prior to the accident, was in the exercise of due care. There are no facts in the record tending either to show care, or excuse deceased for the want of it. It would appear that when the car was twelve feet away, coming at a speed of eight or ten miles per hour, he stepped upon the track and was struck. Under the particular facts in evidence no person in the exercise of reasonable care would have done this. Deceased was guilty of contributory negligence as a matter of law. Roberts v. C. C. Rys. Co., 262 Ill. 228.

The judgment will be affirmed.

AFFIRMED.

159 - 24505

CHICAGO AUTO SALES COMPANY,
a corporation,
Appellee,

vs.

H. J. PETERS COMPANY, a corp.,
Appellant.

Appeal from Municipal Court
of Chicago.

214 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, a corporation, from a judgment entered upon a finding of the court. The plaintiff sued upon a promissory note. The affidavit of merits denied that the note was that of the corporation, alleged that its pretended execution was ultra vires and void.

The suit was begun as a fourth class case, but on motion of the plaintiff, the order was afterwards entered, increasing the ad damnum and transferring the cause to the first class docket. Thereafter the claim was prosecuted to judgment as a case of the first class. The judgment was for $1000, the amount of the note and accrued interest.

It is urged that the court was without authority to transfer the cause from the fourth to the first class docket. In the case of Holmes v. Straus, 283 Ill. 621, the Supreme Court has held that causes begun in the Municipal Court of Chicago in one class may not be transferred to another. The court said, "If a judge of that court can, by order, transfer a case of the fourth class to one of the first class, or from one class to another, then all the distinctions provided by the statute between the different classes of cases can be abrogated, and this would also carry with it, all the provisions of the other sections of the statute in regard to the different methods of procedure as provided for in the different classes of cases." We think by reason of the rule there announced, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible]

[

4 - 23963

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

VIOLA BROWN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 664

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The record in this case and the questions presented to us are in every essential particular the same as in No. 23936, in which an opinion by Mr. Justice McSurely has this day been filed. For the reasons there given the judgment in this case is affirmed.

AFFIRMED.

People v. Robertson
Cited in Full
Case No. 4604

Not
Rel. 7-24-17

308 - 24659

JOSEPH M. LAUGHLIN,
Appellee,

vs.

WILLIAM M. HOPKINSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

211 I.A. 664

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of $15,000 entered against him in the Circuit court of Cook County.

The action was for deceit and alleged false representations in the sale by defendant to plaintiff of a retail clothing business in Toledo, Ohio.

The case was formerly in this court on appeal from a judgment in plaintiff's favor of $20,000 and was reversed and remanded because of excessiveness of the verdict and judgment. 183 Ill. App., 401.

The evidence introduced on the trial shows that in June, 1908, James M. Laughlin, plaintiff, 25 years of age, was a partner in the clothing business conducted under the firm title of Drybread & Laughlin at Emmetsburg, Iowa. He had lived on a farm with his parents until he reached the age of 16 years, when he was employed for a time in a general country store, and later in a bank, taking care of the bank building and furnace and acting as a messenger to collect sight drafts. The defendant, William M. Hopkinson, was a salesman for several years for dealers in men's ware. It was his custom in the course of his work to visit Emmetsburg, where he had met the plaintiff and done business with him at different times during a period of six

years. In June, 1908, the defendant called on the firm of Brybread & Laughlin, sold them a bill of goods, and in a general conversation in the presence of the plaintiff and his partner, the defendant produced from a valise a photograph of a store in Toledo, Ohio, which he described as "the swellest clothes shop west of New York."

Plaintiff testified that defendant's conversation at this time was directed in the main to him; that defendant stated he had owned the Toledo store for four months and he informed the plaintiff of the large business done there and the high profits made upon clothing sold in the store; that among other things the defendant said to him that he, the defendant, had done $25,000 worth of business in the store in the preceding four months and that his profits from such business during those months were $3,000; that the poorest day's business was about $80.

The defendant testified in substance that he had spoken highly of the Toledo store; that in the course of the conversation he addressed Brybread and not the plaintiff; that he did not say that he had done $25,000 worth of business in four months or that he had made $3,000 profits in the store in that time; that he had made no statement as to the amount of business done or his profits therefrom.

Following this conversation, on June 13, 1908, the defendant wrote the plaintiff a long letter in which he stated:

> "We have got a splendid thing. I am making money every day. The store ran $302 net profit last week after all the expenses were paid, but I must put someone in there who has an interest in the business, and that I know is thoroughly reliable, and that I can trust."

This letter, when its whole context is considered, supports plaintiff's version as to what was said by defendant in the course of the conversation. In answer thereto the plaintiff wrote to defendant on July 15th, beginning his letter as follows:

had

"Friend Hop. I have been crazy thinking about your shop." On the next day defendant replied by a lengthy communication which was well calculated to arouse the active interest of plaintiff in the Toledo store. A part of this letter is as follows:

> "The boys in the store tell me we will do from 6[illegible] to $75,000 this year, but I figure conservatively that we will do $50,000 and that we will make at least $20,000 gross with expenses to be taken out of that even if it should run $10,000 which is a financial impossibility, we can make $5,000 apiece, besides, you will have your salary."

On June 27, 1908, plaintiff went to Toledo and was there met by the defendant and one Drohen, a former owner of the Toledo store. Plaintiff testified that the defendant in an aside to him asked him not to inform Drohen of the purpose of plaintiff's visit for the reason that defendant suspected Drohen of dishonesty. Drohen at this time was employed by the defendant in the store. Plaintiff and defendant examined the store with its fixtures and stock. Plaintiff testified that defendantrepresented the cost of the fixtures in the store at $5,660.61. An inventory was made of the stock of goods on hand and fixtures, which together with certain relatively small items of account made a total value of the business, fixtures, etc., of $12,346.34. Plaintiff paid an amount equal to one-half this sum, $6,073.17, for a half interest in the business; the defendant retained the other half interest. A short time later the parties transferred the business to a corporation, retaining therein substantially a one-half interest each.

Plaintiff testified that he discovered some time after he purchased the one-half interest in the business that defendant had falsely represented to him the cost of the fixtures; that he, plaintiff, had learned that the fixtures in fact had cost only $1,404. Defendant testified that the difference between the cost of the fixtures and $5,660.61, the inventoried value thereof, was represented by a loss that the defendant had incurred in purchasing another store at the time he acquired the Toledo store; that he had charged this loss against the fixtures as a "bonus" and that he had fully informed plaintiff thereof.

Plaintiff further testified that on his first visit

to the Toledo store the defendant said to him, "Come back here, Joe, and I will show you the exact business we have done." And that defendant went back to a desk with plaintiff, took out a book, laid it on the desk, and said, "Here it is. You can see for yourself, here is the daily sales." This book purported to show daily sales subsequent to March 12, 19[illegible]8, varying in amounts for the month of March from $11[illegible] to $365; for the month of April from $70.25 to $533.90; for the month of May from $101.6[illegible] to $415.90; for the month of June from $111.15 to $46[illegible].8[illegible]. Plaintiff testified that on a subsequent visit to Toledo the defendant again showed him the sales book, which indicated sales during the first five days of July, 19[illegible]8, as being from $111.5[illegible] to $754.80 a day. Defendant testified that he had never seen the sales book; that it was in the handwriting of Brohen. Brohen testified that the book entries were made by him solely for the purpose of aiding him in procuring a position as a salesman. The jury were warranted in accepting the version of the sales book incidents testified to by the plaintiff.

Much argument is made in the briefs of counsel as to the law applicable to cases where false representations are charged concerning profits to be derived from the conduct of a business and as to what diligence the law requires of a plaintiff who claims to have been defrauded by such misrepresentations. The gravamen of the charges in the present case, however, centers more particularly about the charge of misrepresentations as to the amount of business done in the Toledo store by defendant and the profits derived therefrom before the plaintiff was induced to purchase a one-half interest therein. The evidence on this question was contradictory and it was properly submitted to the jury.

The evidence tends to show that the defendant, a man of long business experience, had with full knowledge of the

[illegible]

facts misrepresented in important particulars the profits and amount of business done in the Toledo store during the four months preceding the time that the plaintiff purchased an interest therein; following the time when plaintiff took charge of the business, July 1[illegible], 19[illegible], the daily sales therefrom were as follows:

> "July 10th, $105.25; July 11th, $3[illegible].7[illegible]; July 13th, $37.35; July 14th, $32.75; July 15th, $9.[illegible]; July 16th, $44.65; July 17th, $32.9[illegible]; July 18th, $10[illegible].45; July [illegible]th, $42.[illegible]; July 23rd, $8.5[illegible]; July 24th, $13.60; July 25th, $277; July 27th, $47.65; July 28th, $9.80; July 29th, $37.65; July 31st, $52.25."

The business thereafter continued unprofitable until about Jan. 1, 1909. During several months the plaintiff, by letters, complained to defendant of the amount of business done; defendant attributed the lack of business to the season and general conditions, and he insisted that the business would increase during the fall and spring seasons. When this correspondence is read it is not easy to escape the conclusion that the defendant was seeking to give specious reasons for plaintiff's plight following the purchase of the business.

Defendant, after the corporation was organized, sold 90 of his 124 shares of the capital stock of the corporation of a par value of $50 per share to plaintiff's brother, 21 years of age, at $75.[illegible] a share; the trial court prevented plaintiff from testifying whether he had advised his brother to purchase this stock. At the time of this transaction defendant borrowed $1,500 from plaintiff's brother.

It is argued that plaintiff's version of the transactions between him and defendant is incorrect because of certain statements made by plaintiff subsequent to his purchase of the interest in the business to the effect that he considered the business both valuable and profitable; that plaintiff had tried to dispose of his interest by a sale for a sum in excess of what he

had paid for it. We think the jury were warranted from all that was submitted to it in concluding that these statements were made by plaintiff as the result of the advice of defendant. It was a fair argument to make to the jury that plaintiff's statements in this connection are quite as significant of the fraudulent purpose of the defendant as any other in the record; for instance, a Chicago attorney went to Toledo presuming to act as a representative of a preppective purchaser, the attorney's brother-in-law, of the store. The attorney procured from the plaintiff an offer in writing for the sale of plaintiff's interest therein for $6,750, and it is said that the offer tends to contradict evidence introduced by plaintiff as to the value of the store and fixtures. The attorney, testifying for the defendant, said that at the time he went to Toledo he was not employed by the defendant, although he admitted that for ten years thereafter and until about the time he took the witness stand, he appeared of record as defendant's attorney in the present litigation. It may be true that the plaintiff on this and perhaps on other occasions had overestimated the value of the stock and fixtures, but we have to do here with the alleged fraud of the defendant concerning the amount and profits of the business, and the law will protect plaintiff against the fraud of the defendant whatever plaintiff might have been willing to do in his dealings with third persons.

In Antle v. Sexton, 137 Ill., 410, it was said:

> "Where a misrepresentation is made as to a material fact *** knowingly, and for the express purpose of deceiving and defrauding, and the party injured relies upon the statement made, and under circumstances which would induce a reasonably prudent man to so rely, there must be a right of action at law for fraud and deceit. To throw a purchaser out of court in such case upon the plea that he did not avail himself of the means of knowledge open to him, would be offering a premium on fraud, and would be destructive of confidence in business transactions."

It was not error to admit the sales book in evidence. Plaintiff testified that this book was shown to him by defendant

as proof of the large business done by defendant prior to the sale of the business to plaintiff and whatever may be said as to the origin of the book, its use and adoption by the defendant rendered it admissible. If the statements contained in the sales book were true, then it is clear that there was an unaccountable falling off in the business done in the store after the purchase of an interest therein by plaintiff.

In Commonwealth v. Clancy, vol. 187, Mass., 191, it is said:

> "In the usual course of events it is not to be expected that an established business of the kind in question will at once seriously diminish without some good cause."

Nor was it error to admit the so-called "Holmes letter," which purported to offer plaintiff a bonus of $6,000 for the store. Plaintiff testified that he sent this letter to defendant and discussed the proposition it contained with defendant and that plaintiff, acting under the directions of the defendant, wrote Holmes a letter asking a $20,000 bonus for the store. Whether the Holmes letter was a genuine offer for the store does not appear, but in view of the undisputed facts of this case it is difficult to understand defendant's rejection of the offer.

A letter was written by Drohen to Dewitt, both of whom were former owners of the store. When the plaintiff took charge of the store he took Drohen's place therein, but kept Dewitt as an employee. In the tortuous account of the dealings and communications between the several parties, Drohen appears as suspected of dishonesty by the defendant and later as cooperating with him. This letter was written December 3, 1908, and begins by stating:

> "Received your letter and am not surprised that Joe is getting wise, but I don't think he will have anything on you or me."

In ordinary circumstances this letter would, of course, be inadmissible, but plaintiff testified that it was given to him by Dewitt and that he showed it to the defendant; that plaintiff told defendant how he got possession of it and that in this conversation the defendant stated that he would take the store off plaintiff's hands.

In Hezelton v. Carolus, 123 Ill. App. 512, the court said:

> "When a question of fraud and deceit is the issue, 'courts are a unit in allowing the greatest liberality in the method of examination and in the scope of the inquiry.' 6 Encyc. of Ev., 22."

The court instructed the jury that the statements contained in the letter in and of themselves and standing alone "were no evidence against the defendant." In view of this instruction and the fact that the letter impliedly charged the defendant with fraud, and that he made no direct denial or explanation of its contents, but, if the testimony of plaintiff be true, he promised to take the store off plaintiff's hands, we are of opinion that the introduction of the letter was not reversible error.

The court did not err in admitting Dewitt's testimony as to the amount of business done in the Toledo store prior to the sale to plaintiff.

The court did not err in giving the second instruction tendered by plaintiff. Other given instructions informed the jury as to what false representations would not be actionable.

Nor did the court err in giving plaintiff's third instruction, which told the jury in effect that alleged fraud might be proved by proof of circumstances "from which the inference of fraud is natural and irresistible" * * * of such character as to produce in the minds of the jury a conviction of the fact of

In minority circumstances this jurist would, of course, be inadmissible, but plaintiff insisting that it was given to him to decide and that he chosen it to be determinant, that plaintiff thus determined him to be not prejudiced of it and that in this circumstances the defendants where just as well have the worse off plaintiff's hands.

In Dwyer v. Spurling, 181 III. App. 214, the court said:

> "Upon a question of fraud and deceit in the issue, 'courts are a unit in allowing the greatest latitude in the method of examination and in the range of the inquiry.' 2 Sayre, id. 1v., 10."

The court instructed the jury that the defendants contained in the issues in not of innocently and knowingly sign "were no witnesses against the defendant," in view of this instruction and the fact that the trial judge sustained the defendant with fraud, and that he made no direct denial or evidence of it, nonetheless, but, if the testimony of plaintiff be true, he proceeded to take the notes off plaintiff's hands, we are of opinion that the instructions of the trial was not reversible error.

The court did not err in admitting Smith's testimony as to the amount of business done in the tin-ware shop in the sale of plaintiff.

The court did not err in giving the second instruction tendered by plaintiff. Other given instructions informed the jury as to what facts representations would not be sufficiency.

Nor did the court err in giving plaintiff's first instructions, which said the jury in effect that bringing fraud might be proved by proof of circumstances "from which the existence of fraud is inferred and intended." * * * of such character as to produce in the minds of the jury a conviction of the fact of

fraud as the same is charged in the declaration, etc. Schwarz v. Reznick, 247 Ill., 479; U. S. Brewing Co. v. Starltenberg, 211 Ill. 531.

The court instructed the jury that in the event the jury found the defendant guilty they might assess plaintiff's damages at a sum equal to any difference shown by the evidence "between the actual market value of the property in question that the plaintiff bought at the time and place of sale, and what it would have been worth had the representations of the defendant been true as alleged in the declaration, together with interest thereon at 5 per cent from date of the purchase to the date of trial." Among other reasons given it is said that the instruction is bad because the jury were permitted to add interest at 5 per cent to whatever sum the jury might find as the difference between the actual market value of the business and its worth as represented by the defendant.

It is urged that the damages claimed were unliquidated and hence interest was not allowable thereon under the statute. The evidence tended to fix plaintiff's loss by reason of the misrepresentations alleged to have been made by defendant. Expert testimony was to the effect that, using the sums named in the alleged misrepresentations of defendant as a basis for computation, the business would have been worth a given liquidated sum on such basis. Objection is made to an instruction which told the jury that punitive damages might be allowed to plaintiff if the jury believed "from a preponderance of the evidence under the instructions of the court, that the defendant acted knowingly, wilfully, fraudulently, maliciously and deceitfully in causing such actual damage to the plaintiff." A criticism made of this instruction is that the jury were told that such damages might be imposed if the jury believed "from a preponderance of the evidence, under

the instructions of the court, that the defendant had acted maliciously," etc. It is stated that the court by this instruction informed the jury "from a preponderance of the evidence" that "the defendant acted knowingly, wilfully", etc. In view of other given instructions which properly instructed the jury that the plaintiff was required upon all material questions to prove his case by a preponderance of the evidence, this instruction is not so erroneous as to warrant a reversal of the judgment.

Several other objections are made to rulings of the trial court upon the giving and refusing to give other instructions, as to which we think no reversible error was committed. The jury were fully instructed as to the law applicable to the case, and if it can be said that in one or two instances technical inaccuracies appear, this fact would not authorize a reversal of the case.

It is urged that the judgment is excessive. In 1910 a judgment in favor of plaintiff for the sum of $20,000 was reversed by this court for excessiveness. The present judgment, entered about eight years after the entry of the former judgment, is not so large as to indicate passion or prejudice on the part of the jury. It is not claimed that punitive damages were not allowable if sufficient evidence was submitted to the jury to warrant a finding that the defendant acted knowingly, maliciously, etc.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

Certiorari denied

435 - 24788

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. Patrick F. Loftus,
Appellee,

vs.

CHARLES E. FRAZIER, JOSEPH P. GEARY and ALEXANDER J. JOHNSON, as Civil Service Commissioners of the City of Chicago,
Appellants.

Appeal from
Circuit Court of
Cook County.

214 I.A. 664[3]

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court awarding a writ of mandamus commanding the respondents, Civil Service Commissioners of the City of Chicago, to hold a promotional examination for the position of lieutenant of police of the police department of the City of Chicago and to permit the petitioner, a detective sergeant of police, and all other detective sergeants of police, patrol sergeants and desk sergeants of police who had served as such for more than one year prior to June 22, 1917, to take the examination.

The trial court found that the relator, Patrick F. Loftus, had shown a legal right to participate in a promotional civil service examination for lieutenant of police. At the outset it may be conceded that a writ of mandamus will not be issued in any case unless the party seeking it shows a clear legal right thereto. People ex rel. Younger v. City of Chicago, 280 Ill. 576, 580. Where, however, a relator has established a clear legal right to participate in a promotional examination a writ of mandamus will be awarded. People v. Reinberg, 263 Ill. 543; People v. Ermant, 229 Ill. 56.

Section 9 of the Civil Service Law is as follows:

"The Commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination, and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination."

Under this section of the act the Civil Service Commissionioners have adopted the two rules following:

"Method of promotion. Whenever avumsancy in the classified service exists, unless such vacancy is filled by reinstatement or transfer, it shall be filled by promotion from the next lower rank or grade, when such rank or grade contains two or more eligible persons desirous of taking examination. Promotions shall be accomplished by means of competitive examination. Should not more than one eligible candidate register, or should all candidates fail to pass, an original entrance examination shall be had."

"Eligibility. No person shall be eligible for promotion from a position in any grade to fill a vacancy in the next higher grade unless the position in which he is employed at the time of examination is in the same line and character of work as the position to be filled, and unless such person has served in such grade by actual employment for at least six months, etc."

Section 3 of the Civil Service Law provides that Civil Service Commissioners shall classify all offices and places of employment in the city "with reference to the examinations hereinafter provided for."

Section 9 of the act above quoted from provides for promotional examinations in the classified service on the basis of ascertained merit and seniority. Under section 3 it became the province of the commissioners to classify all offices under their control for promotional examination. Both section 9 of the act and the rules of the commission above quoted provide that vacancies shall be filled from the "next lower rank or grade." However, the rule above quoted, under the heading "Eligibility," provides that no person would be eligible to a promotional examination unless he was employed

"The committee shall, by its rules, provide for presentation to such electoral district, or to a meeting of electors within such municipality in accordance with such rules, any nominations, and shall provide, in all cases where it is practicable, that nominations shall be filed by proxy. All nominations for candidates shall be signed by not less than two electors, and shall be filed with the returning officer or deputy returning officer."

Under this section of the act the first Tuesday

Nominations were received for the following candidates:

"Right of presentation. Whenever proximity to the neighbouring electoral district, whether such nomination is filed by representation or proxy, it shall be filed by representation from the back based that or place, when such place or place nominations are or have eligible persons entitled to vote at such nominations. Should any person who is eligible candidate register, or attend all meetings this or place, or without nominations shall be not.

"Eligibility. No person shall be eligible for presentation from a position to be put forward to fill a vacancy in the next higher place unless the position so which he is nominated at the time of nomination is on the same line and otherwise at work as the position to be filled. Any person who is a member of a party group by actual membership for at least one month, who,

Section 2 of the first Tuesday the position that first elected representatives shall elected not place or nominations in the city "will be known in the municipal or municipality provided for."

Section 3 of the act where qualified the provides the presentation nominations in the municipal electors on the basis of representation equal and equality. Under section 3 it begins the provide of the municipality to qualify all citizen under their control for presentation nominations. This section 3 of the act was not the taken of the nominations where qualified persons that nominations shall be filled from the "best lower back or place." However, the rule about parties, under the heading "ELIGIBILITY," provides that no person shall be eligible to a presentation nomination unless he has obtained

at the time of such examination "in the same line and character of work as the position to be filed." The commissioners by a rule have assumed to interpret the words "rank" and "grade" as used in the act to be synonymous.

While many apparently interesting questions are presented in the briefs of counsel we are of opinion that the disposal of the single question whether the respondents had, under the act and rules of the commissioners, properly classified relator and other detective sergeants in relation to a promotional examination for lieutenant of police, is conclusive of every material question presented to us for decision. A part of the classification provided for the police department by the commissioners is as follows:

> "Grade II. The following positions are hereby classified in Class D:
> Grade II. Detective sergeant, Sergeant.
> Grade III. The following positions are hereby classified in Class D:
> Grade III. Lieutenants, Lieutenant of detectives, Senior detective sergeant."

The classification adopted by the respondents places the office of senior detective sergeant in grade 3 and that of detective sergeant in grade II. The relator is a detective sergeant and it is a disputed question of fact whether he is employed in the same line and character of work as an uniformed lieutenant of police. We are unable to see any sufficient reason for holding that detective, patrol and desk sergeants are not employed in the same line and character of work as that performed by an uniformed lieutenant of police. Police work generally has to do with a service which has for its end the protection of the public; its principal service is rendered in the prevention and punishment of crime. There is obviously required in this service such division of labor as will best tend to promote the efficiency of

the service. The service required of desk and patrol sergeants has not been changed since the passage of the Civil Service Act.

It is conceded that patrol and desk sergeants are in the same line and character of work, and this notwithstanding the fact that each is employed in the performance of a distinctly different service in the department. The evidence shows that patrol sergeants and detective sergeants are generally employed on outside work in the investigation of crime and criminal complaints, while the desk sergeant's work is the keeping of records and accounts within the police stations. There is some apparent detail difference in the work performed by detective sergeants and patrol sergeants, but we do not think that this difference is so marked as that between patrol and desk sergeants.

In the appropriation ordinance salaries for first class detective sergeants and senior detective sergeants were fixed in the ordinance under "detective division" and not under "subordinate commanding officers" or "patrolmen" and "patrolwomen."

It is evident that the relator's eligibility to an examination for a lieutenancy depends upon what construction is to be given to the phrase "in the same line or character of work." The evidence introduced on this question, we think, supports the conclusion of the trial judge. While there is some difference in the duties required of the different kinds of sergeants appropriated for, this difference is not of such character as would warrant a finding that each was engaged in a line or character of work different from that of the others.

On November 10, 1913, the relator, Patrick F. Loftus, as the result of a promotional examination was appointed to a second class detective sergeant. This position was provided for by section 1915 of a city ordinance passed December 30, 1912,

the country. The service requires of such not general knowledge but not such knowledge about the problems of the civil service.

It is recognized that people not long employed in the same line and unfamiliar with them, not that attempt-ing the first time must be employed in the performance of a particular official service in the government. The reformers above that people employed not indefinite adequate the generally employed on civilly work in the investigation of crime and criminal conditions, while the more original, which is the training of people who possess civilly non political problems. There is some apparent logical difference in the work performed by detective sergeants and legal investigators, but we do not think this difference is so marked as that between patrol and desk sergeants.

In the investigation of criminal matters the field class specially sergeants and senior investigators necessarily work alone in the activities which differed "detectives, investigators" or "patrol-men."

It is evident that the relative eligibility of an investigator for a leadership depends upon what particulars he is qualified to the person "is not some time as detective of merit." The minimum intellectual in this question, we think, requires the knowledge of the penal laws. Until there is some difference in the better knowledge of the different kinds of violations investigated for, this difference is not of such importance as would warrant a limited that some sub-sergeant is a sign of superiority of will differed from that of the others.

In Lawrence St, Stat. Ann. Article 1, Section, we see that length of a preliminary examination for eligibility is a matter since investigative sergeant. This question was practical for by another Detective a city patrolman period thereafter so, that,

and known as the "Police Reorganization Ordinance." On January 11, 1915, the title of "1st class sergeants" was changed by ordinance to "senior detective sergeants" and the title of "second class detective sergeants" was changed to "detective sergeants," and senior detective sergeants were given a higher salary than that paid to detective sergeants. We are inclined to the view that for the purpose of classifying the different positions with respect to promotional examinations, the Civil Service Act vested discretionary power in the Civil Service Commissioners, and that in exercising this power and in determining the rank or grade of the positions in question the respondents were not necessarily required to grade such positions strictly in accordance with the salaries appropriated therefor. Respondents were authorized in making such classification to take into consideration other matters and things in fixing the grades or ranks. People ex rel. Williams v. Errant, 229 Ill. 56.

The appropriation ordinance of January 31, 1917, provided for the salaries of all persons occupying positions in the police department of the city. The ordinance, under the general title of "Department of Police," provides for the salaries of persons employed in the department under the sub-titles "subordinate commanding officers," "patrolmen and police women" and "detective division." Under the heading "subordinate commanding officers" appropriation is made for the employment of 86 lieutenants at $2,000, and 302 sergeants at $1,700 each. Under the sub-title "detective division" the council appropriated for salaries of four lieutenants of detectives at $2,200 each, 94 senior detective sergeants at $1,750 each, and 535 detective sergeants at $1,450 each.

There is evidence in the record to the effect that the position of senior detective sergeant has been abolished; to this effect is the testimony of the Acting Superintendent of

and known as the "police organization [illegible]." On January 11, 1915, the title of "1st class sergeant" was changed by ordinance to "senior detective sergeant" and the title of "second class detective sergeant" was changed to "detective sergeant," and senior detective sergeants were given a higher salary than that paid to detective sergeants. In one instance in the case that for the purpose of classifying the different positions with respect to promotional examinations, the Civil Service Commission denominated power by the Civil Service Commissioners, was that in exercising this power and in determining the rank or grade of the positions in question the commissioners were not necessarily required to grant such positions equality in accordance with the salaries [illegible] therefor. Judgments were rendered in making such classification to help into consideration other matters and things in fixing the grades or ranks. People ex rel. Williams v. Lynch, 200 Ill. 96.

The Administration ordinance of January 11, 1915, provided for the maintenance of all present civilian positions in the police departments of the city. The ordinance, under the general title of "Department of Police," provides for the maintenance of present employees in the department under the sub-titles "subordinate commissioned officers," "patrolmen and police women" and "detective division." Under the heading "subordinate commissioned officers" correspondingly is made for the employment of lieutenants at $2,[illegible], and 200 sergeants at $1,[illegible] each. Under the sub-title "detective division" the ordinance appropriates for salaries of four lieutenants of detectives at $2,200 each, 14 senior detectives at $1,750 each, and 221 detective sergeants at $1,[illegible] each.

There is evidence in the record to the effect that the position of senior detective sergeant has been abolished; to this effect in the testimony of the Acting Superintendent of

the Police Department. The position seems to have been created by the City Council and was expressly appropriated for in the ordinance of January 31, 1917. The statute, however, vested in the Civil Service Commissioners the power and duty to classify all positions and offices under the control of the commission. Acting under this authority the commission placed detective sergeants and sergeants in grade II and included in Grade III lieutenants, lieutenants of detectives and senior detective sergeants. We do not decide as a matter of fact or law whether the position of senior detective sergeant may be said to exist as we are of the opinion that relator is eligible to take an examination for any of the positions named in grade III. By placing the relator and other detective sergeants in grade II the respondents rendered them eligible to take the promotional examination for vacancies in grade III, the next higher position, in which is included the position of lieutenant.

It is reasonable to suppose that the legislature intended to impose upon the Civil Service Commissioners the duty of providing a classification of positions in the police department that would render it possible for patrolman, for instance, by ability and meritorious service, in the course of time, to become eligible for appointment to even the highest civil service position in the department. The contention of respondents, if sustained, would render this in some cases extremely difficult if not impossible. People v. Kipley, 171 Ill. 44.

Section 9 of the Civil Service Act imposes upon the commission the duty to fill all vacancies in the classified service, and wherever practicable, by promotion. On the pleadings and the evidence in the record we hold that under its classification the Civil Service Commissioners are required to

the Public Department. The position seems to have been created by the Civil Service Act and apparently incorporated for in the estimates of January 1, 1912. The statute, however, vested in the Civil Service Commissioners the power and duty to classify all positions and officers under the control of the commission. Adding weight to this statutory law constitutes plenty reasons supporting the language in group II and included in group III statements, statements of intentions and similar documents. To do not include as a matter of fact or law consider the position of minister statutorily supposed and so also is added as one of the opinions that relative to statutory to take an examination for any of the positions listed in group III. By placing the minister and other industrial employees in group II the legislature thus eliminate in lieu the premeditated exclusion for examination in group III, the sole objectives, in which includes the position of Statement.

It is reasonable to suppose that the legislature intended in imposing upon the Civil Service Commissioners the duty of providing a classification of positions in the Civil Service requirement that merit should be paramount the principle, for instance, to ability and qualifications certain, in the service of state, in order utilize the efficiency to avoid the highest civil service position in the department. The combination of employments, if necessary, would rather hide in some cases economy difficult if not impossible. Ewing v. Cooley, 171 Ill. 61.

Section 2 of the Civil Service Act imposes upon the commission the duty to fill all vacancies in the classified service, not otherwise provided, by promotion. In the placing has not the validity in the former or that that under the classification the Civil Service Commissioners are required to

admit the relator to take the examination for lieutenant; that the position of detective sergeant is in the "same line and character of work" as the position of uniformed lieutenant.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

482 - 24836

NATIONAL FIRE PROOFING COMPANY,
a corporation,
Appellee,

vs.

LANQUIST & ILLSLEY CO., a corp.,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

214 I.A. 664 4

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff, National Fire Proofing Company, brought suit in the Superior Court of Cook County against the Lanquist & Illsley Co.

The declaration consists of the common counts and one special count. The latter count in substance alleges that the defendant on February 12, 1912, entered into a contract with plaintiff, under the terms of which the plaintiff agreed to fully complete certain fire proofing work on a building in Buffalo, New York, for the sum of $66,000; that plaintiff thereafter entered upon a performance of the contract; that on December 14, 1912, as the result of disputes between the parties, the defendant proposed to plaintiff that it, defendant, would complete all the work then remaining unperformed by plaintiff and required to be done by it under the contract of February 12, 1912, if plaintiff would allow to defendant a credit of $17,400 on the contract sum of $66,000; that defendant on said 14th day of December duly accepted the proposal of plaintiff and on December 16, 1912, the defendant entered upon the completion of the work required to be performed by plaintiff under the contract of February 12, 1912; that it was agreed under the terms of the contract of December 14, 1912, that plaintiff should furnish the defendant all necessary material to complete the work required under the original contract and to permit defendant to use all machinery and appliances, then on the

premises, belonging to plaintiff; that plaintiff has fully performed all things required of it under the contract of December 14, 1914, but that defendant has refused and still refuses to pay plaintiff the sum due it.

The defendant filed a plea of the general issue to this declaration.

The original contract provided that the "work shall be commenced on or before July 1st and carried forward at such a rate of progress as will insure the completion of not less than two floors of arches each week, if the structural steel work is erected so as to permit the same being done. All the partition work and furring shall also be carried forward at such times and in such manner as will insure that the contract will be entirely completed not later than November 1, 1912." Plaintiff entered upon the performance of the work required of it under the original contract in the latter part of September, 1912.

The disputes referred to in the declaration concern alleged delays which it is asserted rendered it impossible for the plaintiff to begin work upon the building until sometime in September. The evidence shows that the plaintiff thereafter refused to complete the contract unless it was modified so as to allow plaintiff an additional sum for expenses which it claimed would be necessarily incurred by it in doing the work in the less favorable weather of the fall and winter. December 13th the plaintiff sent the defendant the following telegram:

> "Frozen up at Buffalo. Have suspended operations, and don't intend starting again until you make arrangements for extra compensation, account of weather conditions. Answer what you will do."

December 16, 1912, the defendant in answer to the above and also telegrams dated December 12th and 13th, 1916, respectively, wrote that it would accept an offer of plaintiff

that the defendant take over the completion of the work unperformed under the original contract; the defendant, as proposed by plaintiff, to be allowed a credit on the sum to be paid under the original contract of $17,400. In this letter the defendant stated:

> "We desire herewith to enter our formal protest against this action on your part, but in view of the fact that we have undertaken to complete the building at a stated time, which will not permit of any further delay, we find ourselves under the necessity of acquiescing in your demands."

The original contract provided that the work was to be begun on or before July 1st, 1912, and the evidence is undisputed that the plaintiff was unable to begin the work until sometime in September, 1912. Plaintiff's protest, that it would be impossible under the circumstances to complete the work as provided by November 1, 1912, and that because of delays it would necessarily incur increased expenses in doing the work, seems on the evidence to be founded in reason. There is, however, practically no dispute in the evidence that the fact of the delay and its effect upon plaintiff's rights under the contract was the cause of plaintiff's insistence that a new arrangement be made between the parties. As the result of these conditions the parties entered into a new contract under which the defendant agreed to complete the unperformed work required of plaintiff under the original contract, in return for which defendant was to be allowed a credit of $17,400 on the total sum of $66,000 agreed to be paid plaintiff under the terms of the original contract. Defendant, after it completed the work on the building, mailed to plaintiff a statement in which it charged plaintiff with an indebtedness of $23,741.26, being the sum which the defendant claims was expended by it in completing the work which it performed under its last agreement with the plaintiff, and the difference between this sum and $17,400, which plaintiff claims should be charged to it, constitutes the sum in controversy between the parties.

Defendant on Jan. 23, 1914, wrote to the plaintiff as follows:

"Herewith we send you voucher and check for $2042.54 in settlement. Please receipt voucher and return to us."

The voucher which accompanied the above letter recited:

"To invoice Rendered

Sub-Contr. Marine Bank	In Full settlement of contract extras and all claims of every kind and nature on account of fire proofing Marine National Bank Building, Buffalo, New York,.....	$2,042.54
	Total.....	$2,042.54."

This voucher also contained the following:

"If not correct return all papers. Do not fold voucher except as received."

The plaintiff deposited the check to its credit in a bank, but did not, as directed by defendant, receipt or return the voucher to defendant.

We are of opinion that this case does not, as urged, involve a consideration of an account stated. On the evidence the contractual relations between the parties were such that there was no occasion for a statement of any account between them. The defendant expressly agreed that it would perform the uncompleted work for a specified allowance on the original contract of $17,400, and the evidence shows that it did perform this work. There was then nothing more required of defendant than that, in accordance with its promise, it give credit to plaintiff for this sum. It undertook, however, notwithstanding the agreement, to charge the plaintiff with a sum that the uncontradicted evidence shows plaintiff never agreed to pay. The action of the defendant in mailing the check, letter and voucher or the statement referred to, in and by which it sought to charge plaintiff with an obliga-

tion that it never assumed, cannot be held to constitute an account stated. An account stated is an express or implied agreement between parties that all items in an account stated are correctly stated therein. King v. Machisney, 88 Ill. App. 341.

An accord and satisfaction was not shown by the evidence of any matter in dispute between the parties. Where there is a bona fide dispute, the acceptance of a certain sum in settlement is an accord and satisfaction. Bingham v. Browning, 97 Ill. App. 442.

There was in fact no dispute of any kind whatsoever between plaintiff and defendant at the time defendant sent the letter and voucher, or the statement, to the plaintiff. It was shown on the trial that, excepting the attempt to charge plaintiff with the costs incurred by defendant in doing the work after the work had been performed, there was no controversy of any kind between the parties.

The defendant was not compelled by duress to enter into the agreement of December 16, 1912. It was at that time fully aware of the claims which the plaintiff was then making of a right to abrogate the contract. If it was then the opinion of defendant that the claims of plaintiff were not well founded, it, defendant, had at least the legal right to refuse to comply with plaintiff's demands. The fact that the defendant became embarrassed in the performance of its obligations to construct the building in question did not, under the circumstances, amount to duress. Kertling v. Hilton, 152 Ill. 658.

The main issue in the trial court was whether the defendant had the legal right to charge to the plaintiff a larger sum than that which the defendant admits it agreed would be charged for the work performed by defendant.

As stated in the case of Levenson v. Gillen Publishing Co., 62 N. Y. S. 472:

[illegible] that it never happened. Cannot he then, in consistency, do more than plead. In Commonwealth pleading is an objective or logical relationship between parties that will lapse in an instant unless was materially pleaded traversal. Elder v. Commissioner, 68 Cal. App. 241.

An amount was anticipated when not claimed by the pleadings of any party is clearly between the parties. Above there is a large class disputes, the consequences of a verdict upon is additional to an amount not mentioned. Thompson v. Freeman, 47 Ill. App. 442.

There was in fact in existence of any such misunderstanding between plaintiff and defendant as the time material point the issues and trouble, it did plaintiff. It was alone on the total loss, excluding the difference in damage plaintiff with the usual insured by defendant is doing the with first the most one been pleadings. There was no substantially of any kind whatever the pleading.

The decision was not dependent by Judges in which the University of Tennessee in 1912. It was at least that fully aware of the issues which his plaintiff has been entitled of a right to recovery the contract. If it was that the opinion of defendant that the issues of plaintiff made not well founded, it, however, had to insist the "right right" to refuse or supply with plaintiff's demand. This fact that the pleadings based upon transmission in the relationship is involved the building is insured did not, under the circumstances, amount to error. Pearlman v. Lipton, 78 Ill. 448.

The same issue in the trial court was whether the defendant had the legal right to resort to the plaintiff a larger sum than was with the defendant which it legal shall be analyzed for the work performed or delivered.

As stated in the case of Lawson v. Union Insurance

(1) . 63 N. Y. 4, 1871

> "The check was not tendered in full satisfaction after a dispute between the parties. There is no element of assent either express or implied on the part of the plaintiff * * * the mere retention of a check under the circumstances disclosed does not bar the action for the balance."

The defendant asserts a right to set aside a contract without the consent of the other party thereto, and this, after the contract had been performed. Its attempt to do so did not create a dispute in good faith between the parties.

It has been held that where an ascertained sum of money is fully due and payable from one to another, if the creditor accepts in discharge of the debt a sum less than is due, the indebtedness will be discharged to the extent only of the amount paid. Hayes v. Massachusetts Life Insurance Co., 125 Ill. 638.

There was, as stated, no matters of accounting between the parties. The claim of plaintiff was not for an unliquidated sum.

The cases cited by counsel for defendant are generally not in point; they refer in the main to cases involving unliquidated claims or accounts disputed in good faith. Ostrander v. Scott, 161 Ill. 339. The defenses suggested of estoppel and recoupment are not applicable to the case at bar. We have been unable to discover any evidence in the record in support of the claim that the plaintiff was estopped to assert its rights under either of the contracts entered into with defendant.

The judgment of the Superior Court will be affirmed.

AFFIRMED.

54 - 24896

CHUTCHFIELD, WOOLFOLK & CLOKE,
a corporation,
Plaintiff in Error,

vs.

ATLANTIC COAST LINE RAILROAD
COMPANY, a corporation,
Defendant in Error.

ERROR TO COUNTY COURT
OF COOK COUNTY.

214 I.A. 664[5]

MR. PRESIDING JUSTICE DRIVER
DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks to reverse a judgment entered in favor of the defendant by the County court of Cook County.

Plaintiff brought suit against the defendant to recover damages because of defendant's negligence as initial carrier of three carloads of celery and oranges shipped by plaintiff from Florida. The shipments in question are conceded to be as follows:

> "Car F. G. E. 23014, containing 365 crates of celery was shipped from Sanford, Florida, April 2, 1913, and arrived in Chicago April 11, 1913."

This car was moved to Memphis, Tenn., and arrived there April 7, 1913, at 2.00 oclock a. m. Due to a flood on the lines of the Illinois Central railroad it was sent over the lines of another railroad company to Galp, Arkansas, where it arrived at 5.00 p. m. April 9, 1913. It was then shipped over the lines of the Illinois Central Railroad Company and arrived in Chicago April 11, 1913, at 6:30 a. m.

> "Car F. G. E. # 17140, contained 300 boxes of oranges and was shipped from Largo, Florida, to F. Pugazzi & Co. at Cincinnati, Ohio, on January 27, 1912, and arrived at Covington, Ky., on January 31, 1912, on which date the oranges were found to be in good condition."

This car was held in holding yards at Covington, Ky., subject to the consignee's orders until the following day, February 1, 1912,

when the consignee directed the railroad company to ship the car to Chicago, "all charges to follow; plugs out and vents open to protect from freezing." This car left Covington, Ky., at 12:05 p. m. February 2, 1912, and arrived at Chicago Sunday, February 4, 1912.

> "Car F. E. C. 24129, containing 350 crates of celery was shipped January 31, 1912, to Sanford, Florida, for Chicago."

Due to a Georgia statute which prohibited the running of freight trains on Sunday this car was held at Martin, Georgia, from 6:25 a. m. Sunday, February 2, 1913, until 12:01 a. m. February 3, 1913, when it was sent on its journey to Chicago where it arrived on February 7, 1913, at 6:10 a. m.

The above facts, with others not necessary to refer to, are in the main stipulation by the parties. It is contended by the plaintiff that the evidence shows that the celery which was contained in car 23014 was found to be decayed and heated when it arrived in Chicago, and that the oranges which were shipped in car 17140 and the celery which was shipped in car 24129 were found to be frozen when the cars arrived in Chicago.

At the close of all the evidence the court instructed the jury to find for the defendant upon the 7th, 8th and 9th counts of the declaration, which related to the shipments from Sanford, Fla., January 3[illegible], 1913, in car 24129 and it is insisted that this action on the part of the court is erroneous.

We are inclined to agree with the contention that there was no proof of the damaged condition of the celery shipped in this car when it arrived in Chicago. The plaintiff attempted to prove by one of its employes that the celery was frozen when it reached Chicago. It is a much disputed ques-

when the remaining elements the multiple employs be also its use to Chicago, full account be Friday page and and venue room to prevent from treating." Ibid and left treatments, 17., at 1210; p. m. February 2, 1912, had returned at Chicago Sunday February 4, 1912.

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tion of fact between the parties whether the celery shipped in this car was or was not in good condition when it left Sanford, Fla., but whatever its then condition or whether it was unduly delayed during its transit, there was no admissible evidence in the record from which the jury would be authorized to conclude that it was in a frozen condition when it reached Chicago.

No witness for the plaintiff testified to any facts from which the jury could infer that the celery in this car was frozen when it arrived in Chicago. W. A. Merkle, sales manager for plaintiff, attempted to testify that this celery was frozen. His testimony with relation to this subject, however, was inadmissible. He had no personal recollection of its condition when it arrived in Chicago. The witness testified that certain papers prepared under his supervision enabled him to tell of the condition of the celery. These papers were written by one Giroux. The witness said that he saw the papers at or about the time they were written; that they were in a regular form used by plaintiff; that it was witness' business to inspect a great many cars in the course of a week and that with the papers before him and after looking at them he was unable to say, aside from what was written in the papers, that he had any recollection of the condition of the contents of cars 23104 and 24129. From the testimony of this witness it is clear that he had no recollection at the time he testified of the condition of the goods in the cars in question at the time they arrived in Chicago, and that his recollection was not in fact refreshed by an examination of the papers.

Giroux, who testified for the plaintiff as a clerk, stated that he had written certain of the papers referred to. It is not pretended that this witness of his own knowledge knew anything of the condition of the goods when they arrived in Chicago.

We think it appears from the record that no admissible evidence was offered or introduced by the plaintiff which tended to prove the condition of the celery in either car 24129 or 23104 when they arrived in Chicago.

It is evident from the whole testimony of the witness Merkle that he had no recollection of the condition of the goods in these cars except what he read in the papers which were submitted to him. Whether the defendant was or was not guilty of negligence in the transportation of the celery and oranges was, under the evidence, a very much disputed question of fact, and while there is force in the suggestion that the court should have instructed the jury that there could be no recovery with respect to the goods shipped in car 23104, as well as that shipped in car 24129, the conclusions arrived at by the jury on the question of negligence are not in any event so manifestly wrong as to authorize a reversal of the judgment.

Whether as a matter of fact the record contains evidence of any negligence on the part of defendant with reference to these two cars, need not be determined here, for the reason that the verdict and judgment of the trial court were in favor of the defendant.

The trial court refused the following instruction tendered by plaintiff:

> "The court instructs the jury that in the event you find from all the evidence in this case that the goods in question were, when delivered to said defendant at point of origin, in good sound merchantable or shipping condition and at the time of arrival at destination were not in good marketable condition, then and in that event, you are instructed that the negligence of the said defendant is presumed therefrom; and the burden is thereupon upon said defendant to rebut said presumption."

One criticism made of this instruction has merit. This instruction in effect told the jury that if the goods were in good shipping condition when delivered to defendant and were unmarketable when they arrived at their "destination," then the defendant would

[illegible] [illegible] [illegible] [

be presumed to be negligent. Neither by the instruction nor by the evidence was the jury informed as to what was meant by the phrase "good shipping condition."

Instruction 14 tendered by plaintiff was properly refused by the trial judge for the reason that it had no applicability of the facts of the case. This instruction told the jury that defendant could not escape liability by reason of any defective materials or equipment used by it.

Plaintiff's theory was that the goods were negligently delayed in transit or that they were by lack of proper care permitted to become overheated or frozen. The evidence introduced tends only very slightly to prove the use of defective materials or equipment.

As stated above, with reference to two of the cars shipped, no admissible evidence was admitted tending to prove the non-marketable condition of the goods when they arrived in Chicago and as to these shipments it was not error to refuse these instructions.

With reference to the carload of oranges, car F.G.E. 17140, the destination of this shipment was Cincinnati, and the oranges were delivered there or at the holding yards at Covington, Ky., in good condition. At this point the goods were, by order of the consignee and under a new contract shipped over another line to Chicago. If by the word "destination" in the instruction was meant Chicago, then for this reason the instruction was erroneous, as under the first shipment of the oranges the evidence is clear that they arrived at the destination provided for by that contract in good condition. The only evidence in the record which might render this instruction proper is that relating to the car in which the oranges were shipped. It was not error to refuse this instruction and also instruction 11 tendered by plaintiff, for the

reason that this car was consigned to Cincinnati and arrived at its destination with the oranges in good condition.

It is assumed by instruction 11 that the consignee had the right to and that he did divert car 17140 while it was in transit to a different destination than that indicated in the original shipment contract. The evidence shows that when the goods arrived at Covington, Ky., they remained there for a day and were, on the order of the consignee, given to the Louisville & Nashville Ry. Co., upon whose tracks the car remained while at Covington and were then shipped to Chicago over the line of the Big Four Railroad Company. It cannot be said as a matter of law that the goods were in transit at the time this order was given. The instruction assumed that the goods were in transit during the time they they remained at Covington, Ky.

In the case of Gamble-Robinson Co. v. Union Pacific R. R. Co., 262 Ill. 400, it is said:

> "If the defendant had not undertaken and agreed to continue the shipment from Omaha to the final destination, its liability would have ceased when the property arrived at Omaha, and this is substantially what was held in Parker-Bell Lumber Co. v. Great Northern Ry. Co., 124 Pacific Reports, 589. In that case there was a shipment of shingles over the Great Northern railway from Sisco, Washington, to Kankakee, Illinois. A bill of lading was issued in which the railroad company agreed to safely carry and deliver the shingles to Kankakee, Illinois. It made no further agreement or undertaking to deliver them anywhere else. Upon arrival of the shingles at Kankakee over the Chicago, Indiana & Southern railroad, which was the final connecting road over which the shipment was made, at the request of the owner of the shingles, the last named railroad diverted them to Palisades Park, New Jersey, issued a new bill of lading and forwardd the shingles over a new line of connecting carriers. It was held the liability of the initial carrier ceased with the delivery of the shingles at Kankakee. We do not understand that decision to be in conflict with the views we have expressed. In that case the initial carrier never, orally or by bill of lading, agreed to carry the shingles to any destination other than Kankakee. The contract to divert the shipment from Kankakee to Palisades Park appears to have been made by the owner of the property with the last connecting carrier in the shipment from Sisco to Kankakee. Clearly, that railroad company could not extend the liability of the initial carrier for a shipment beyond the destination to which the initial carrier accepted the shingles and agreed to safely carry the same."

The question under consideration here is not directly decided in the case of Starks Co. v. M. C. R. Co., 207 Ill. App. 333. In that case the statement of claim charged that the goods were delivered to the common carrier for transportation from Mattewan, Mich., to Louisville, Ky., "for reconsignment," and in its opinion the court said:

> "If the reconsignment had not taken place until after the arrival at Louisville, under circumstances which might be held to be a delivery, a more difficult question would be presented for consideration. However, we are not called upon to consider such a state of facts."

As we read the evidence in the record, error in the giving of instructions could have had no injurious effect upon the rights of the plaintiff, for, as stated, it is our opinion that on the whole record the trial court should have instructed the jury to find the issues for the defendant as to all three shipments.

The judgment of the County court is affirmed.

AFFIRMED.

122 - 24986

HATTIE MUELLER, Administratrix of the estate of Ferdinand Fluegel, deceased,
Plaintiff in Error,

vs.

HERMAN FLUEGEL,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 665

MR. PRESIDING JUSTICE DAVER DELIVERED THE OPINION OF THE COURT.

Ferdinand Fluegel and Herman Fluegel, brothers, were in August, 1915, members of Tent No. 181 of the Knights of Maccabees. As the result of an oral agreement between them Ferdinand named Herman as the beneficiary in his certificate for $1,000, Herman promising that after he received the $1,000 on the certificate on the death of Ferdinand to pay the funeral expenses of Ferdinand and to arrange for the perpetual care of his grave. Under the agreement Herman was to pay $300 for the burial expenses and $200 for the perpetual care of the grave. The administrator of the estate of Ferdinand brought suit; a judgment was entered by the Municipal Court in favor of the defendant, Herman Fluegel, and this writ of error has been sued out to reverse this judgment.

It is shown by the evidence that after the death of Ferdinand, the defendant, Herman Fluegel, received the amount of the certificate, $1,000, and has failed and refused to comply with his promise to pay the funeral expenses or to provide for the perpetual care of the grave.

The only point made by the defendant is that insurance money does not in any event become assets of an insured's estate and cannot be recovered in any proceedings therefor by the

administrator. There are well considered cases which seem to sustain this contention. Eastman, Admr. v. Prov. Mut. Bel. Assn., 62 N. H. 555. However, the plaintiff is not seeking to recover insurance money as such. The action is brought upon an oral promise in return for which the defendant was named as beneficiary in the certificate.

In the case of Armstrong, deceased, etc. v. Grodson, Admr., 182 Ill. App. 483, it was held that an administrator was not limited to the recovery only of "identical property" and that where a person who was charged with the duty of selling property and paying the debts of a deceased person and who had only paid a portion of such debts, the administrator was entitled to recover for the estate the remainder of the proceeds arising from the sale of the property.

At least, as to the promise to pay the funeral expenses, the defendant's contract is enforceable by the administrator of the estate. The contract was clearly made for the benefit of the estate and it relieved it of a liability which the law imposed upon it to pay the funeral expenses.

The trial court held that an executory contract had been entered into between decedent and the defendant and this holding is supported by the evidence. A majority of this court is of opinion that the $200 provided for the care of the burial lot is also recoverable by the administratrix against the defendant. The suit by the administratrix is an equitable action to recover, for the benefit of the estate, money which in equity and good conscience belongs to it and which the defendant has no legal right to retain.

It cannot be said that the conclusions here arrived at modify the contract as expressed by the benefit certificate. The judgment in favor of the administratrix results from an

constitutions. There are most remarkable cases which show it matter little otherwise. Gutman, John, v. Pitt. Tel. Pub. Corp., 21 O. R. 528. However, the plaintiff is not entitled to recover damages merely as such. The notice is invalid even as used primarily to relieve the defendant from liability for negligence in its constitution.

In the case of Lewisham, Municipal, City, v. Corporation, Pitt 111. 1899, 1Ch. 11 was held that an administrator was liable in the temporary sale of Plaintiff's property and that where a person who was charging with the duty of selling property and paying the debts of a deceased person and who had only paid a portion of such debts, the administrator was entitled to recover for the extra use occasioned of the property arising from the sale of the property.

It issue, be it the trouble to pay the Federal expenses, the defendant's evidence is sufficiently by the administrator of the estate. The evidence was clearly made for the benefit of the estate and it matters is of a liability which the law imposes upon it to pay the federal expenses.

The right court held that by administrator contract and thus entered into between decedent and the defendant and that nothing in evidence to the contrary. A majority of this court is of opinion that the lower provided for the date of the burial but it was erroneously by the administrator upsetting the defendant. The rule by the administrator is an equitable notion in reserve, for the benefit of the estate. Among other in order and some consideration Statutes to it was which the directed from an legal point to return.

It seemed to hold that the mortgagee here entered a motion the contract as authorized by the benefit institution. The judgment in favor of the administrator results from an

independent contract under which the defendant has received, as a consideration for his promise, $1,000. The contract being in part executed the defendant will be held to the performance of his promise.

The judgment of the Municipal Court is reversed and judgment entered here in favor of the plaintiff for the sum of $500.

REVERSED AND JUDGMENT HERE.

122 - 24986

HATTIE MUELLER, Administratrix with the will annexed of the estate of FERDINAND FLUEGEL, deceased, Plaintiff in Error, vs. HERMAN FLUEGEL, Defendant in Error.	Error to Municipal Court of Chicago.

214 1A 665 M

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The petition for a rehearing filed by the defendant will be denied. In view, however, of the argument presented therein we are of opinion that the opinion heretofore filed in the cause should be modified.

An examination of the abstract of record discloses that the only issue of fact presented to the trial court by the affidavit of merits filed by the defendant was whether defendant had ever entered into any agreement with Ferdinand Fluegel, deceased, as set forth in plaintiff's statement of claim. The sole issue presented by the pleadings in the cause was whether the defendant in fact had ever agreed to pay $500 for funeral expenses and for the care of deceased's grave.

On a further examination of the record we are of opinion that the defendant, by reason of the position which the trial judge took on the trial with reference to certain questions of law, did not present the defense relied upon by him in his affidavit of merits. This court is of the opinion that the trial court should have held as law the propositions of law offered by the plaintiff numbered 1, 2, 3 and 4 respectively.

The judgment of the Municipal Court will therefore be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

143 - 25012

M. J. LEE,
Appellee,

vs.

V. M. HANLEY,
WALTER M. LOWNEY CO., Garnishee,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

214 I.A. 665

This is an appeal from a judgment against Walter M. Lowney Co., a garnishee, on a judgment entered in the Municipal court on June 14, 1917, against defendant, V. M. Hanley.

The judgment against the garnishee was for the sum of $105. A garnishee summons in the suit was issued on September 17, 1918, and was returned served on the garnishee on September 18, 1918. On October 4, 1918, the garnishee corporation filed its answer to the summons, in which it set forth in substance that it had not in its possession, custody or control any funds of the defendant, V. M. Hanley, and that it was not indebted to him in any sum whatsoever.

The plaintiff was given leave to contest the answer of the garnishee and it called for examination, under Section 33 of the Municipal Court Act, George M. Sullivan, who testified that he was manager for the garnishee since August, 1916; that Hanley, the defendant, had been in the employ of the garnishee since October, 1916; that at the time of the service of the process upon the garnishee, Hanley was indebted to it in the sum of $70; that Hanley was paid by the garnishee a weekly salary of

$30 and an additional sum of $5.00 per week for expenses; that since the date of the service of the process the garnishee had paid to Hanley in various amounts a total sum of $105; that these sums were advanced to Hanley for salary that had not been earned by him. This witness further testified that during the entire time of Hanley's employment by the garnishee he had been indebted to it for salary advanced in sums ranging from $40 to $200. In answer to questions put to the witness by the court he stated that the indebtedness of Hanley to the garnishee was not regarded as being due at any definite time; that if Hanley should leave the employ of the garnishee it would demand the immediate payment of whatever sum was owing to it by him.

Counsel for the garnishee offered to prove by this witness that the indebtedness of Hanley to the garnishee was an open running account due at any time to the garnishee. The court refused to admit this proof. Counsel for the garnishee further offered to prove by this witness that the judgment debtor was a wage earner, the head of a family and residing with same, and therefore entitled to exemption.

The judgment of the Municipal court against the garnishee was not warranted by the evidence introduced. On the record it is undisputed that Hanley was indebted to the garnishee at the time of service of the garnishee process and that thereafter the garnishee had advanced at different times the sum of $105 to him. At the time these advances were made, if the testimony of the witness be true, the garnishee was not indebted to Hanley. The fact that the plaintiff was at the time the judgment creditor of Hanley did not, as we read the authorities, preclude the garnishee from making advances or loans to Hanley provided this was done in good faith, and there is nothing in the record tending to show that the advances were made in bad faith or for the purpose of defeating the claim of plaintiff.

The case of Howard Co. v. Miller, 123 Ill. App. 483, relied upon by the plaintiff is not in point. It was properly held in that case that a garnishee is bound to answer as to any debt due the judgment debtor at the date of service or becoming due thereafter. As we read the opinion in that case the garnishee therein was not indebted to Miller, the judgment debtor, at the date of the service of process upon him, but that it thereafter continued to pay him his salary of $75 per month. It does not appear that these payments were for services to be rendered by Miller in the future.

In the case of Chicago & Eastern Illinois Ry. Co. v. Blagden, 33 Ill. App. 254, it is said:

> "What rule is there that would make it improper for the company to loan or advance money to Blagden on an understanding or agreement that he would pay in services thereafter to be rendered. Collusion by the company with Blagden to prevent the plaintiff from obtaining anything that the service of the writ to the garnishee entitled him to, is, to say the least, not necessarily to be inferred from the facts set up in the answer. Such inference is, as it seems to us, in fact negatived. Blagden was not obliged so far as it appears, to continue in the employ of the company after the service of the writ, and if he did, then there was nothing to prevent the company from paying him in advance, even though the very purpose of such advance payment was to prevent the wages from being reached under the garnishment."

We think it was the right and duty of garnishee to claim and to prove whatever exemptions the law permitted to the judgment debtor.

The judgment of the Municipal court will be reversed and the cause will be remanded with directions to discharge the garnishee.

REVERSED AND REMANDED
WITH DIRECTIONS.

164 - 25040

EDWARD H. HARRISON,
Appellee,

vs.

ROSEHILL CEMETARY COMPANY,
a corporation,
Appellant.

Appeal from
Circuit Court,
Cook County.

214 I.A. 665

MR. PRESIDING JUSTICE DAVIS
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Circuit Court of Cook County in favor of plaintiff for the sum of $1,418.05.

It is conceded by both parties that the only question involved here is:

> "Whether or not the Circuit Court erred in striking from the files an amended affidavit of defense filed on behalf of the defendant, and also striking defendant's plea from the files and taking default and judgment against defendant for want of a plea."

In Firestone Tire Co. v. Ginsburg, 285 Ill. 132, the Supreme Court said:

> "The judgment of a court in an action at law is presumed to be free from error, and although pleas present a good defense to an action unless the record shows upon what ground the action of the court was based, it will be presumed that sufficient cause to justify the ruling was made to appear. Fanning v. Russell, 81 Ill. 398; Consolidated Coal Co. v. Peers, 166 Ill. 361.
>
> "Where an affidavit of merits is insufficient it is proper practice to strike it from the files and the plaintiff is then entitled to judgment as in case of default. After an affidavit of merits has been stricken from the files it is not necessary to strike the pleas from the files, although the practice is not improper and is common. Cramer v. Illinois Commercial Men's Ass'n., 206 Ill. 516.

> "The rule ordinarily applicable would require that the bill of exceptions should show the grounds of the motion to strike pleas and an affidavit of merits from the files, and for what cause and upon what grounds an order of that kind was made."

The declaration filed in the cause consists of the common counts supported by an affidavit which alleged that the defendant was indebted to plaintiff for services rendered as a certified public accountant in the sum of $1,833.35. On May 22, 1917, defendant filed a plea of non-assumpsit to the declaration and an affidavit of meritorius defense, to which a demurrer was sustained and the defendant was given leave to file an amended affidavit of defense. On order of court a bill of particulars was filed by plaintiff. On June 14, 1917, an amended affidavit of defense was filed by defendant. Thereafter on May 11, 1918, on motion of plaintiff the amended affidavit of merits was stricken from the files and defendant was given leave to file its second affidavit of merits within 15 days and on June 8, 1918, an order of default of defendant was entered for failure to file an affidavit of merits. On June 11, 1918, the following order was entered of record:

> "This cause coming on to be heard on the motion of the attorney for the plaintiff IT IS ORDERED that the order entered herein on to-wit Saturday the 8th day of June A. D. 1918 be vacated and the following entered in lieu thereof to-wit The defendant ROSEHILL CEMETERY CO. having elected to stand by its amended affidavit of merits IT IS ORDERED that said defendant's plea filed herein be stricken for want of an affidavit of merits and that the default of the said defendant be taken for want of plea filed in said cause and the defendant thereupon demands a jury to assess the damages etc."

A jury was impaneled and a verdict and judgment was entered in the cause in favor of the plaintiff.

While there is force in the contention that the bill of exceptions does not clearly show the grounds upon which the court acted in striking the amended affidavit of merits from

"The only conceivable exception would require that the bill of exceptions should include some proof of the existence in which place and at affidavit of Andrew Ivor the Clerk, and for what Master and upon which grounds an order of this Court was made."

The Registrar's ruling in the same paragraph of the memorandum supported by an affidavit which alleged that the defendant was incapable in physical for appearance resulted in a hospital public environment in the case of G. vs. G. On May 20, 1969, defendant filed a plea of non-compliance in the declaration and affidavit of merits/ of meritorious defence, in which a summary was included the information was given Emmy in file in medical affidavit of defence. On October of every a bill of particulars was filed by plaintiff. On June 14, 1969, an amended affidavit of defence was filed by defendant. Commencing on July 11, 1969, on motion of plaintiff the amended affidavit of merits was struck from the case and interlocutory was given Emmy to file the second affidavit of merits which filed on July and on June 2, 1969, an order of affidavit of interlocutory was entered for failure to file an affidavit of merits. On June 11, 1969, the Principal judge was entered of judgment:

"This cause coming on to be heard on the motion of the defendant for the plaintiff to be directing that the order entered during on January the 2nd day of June 1969, with the amended and the telephone provided in item Number Twelve that the defendant filed the affidavit on Barton dated to which by its same affidavit of merits of 21 October 1969 which defendant's plea fixed merits be striking for want of an affidavit of merits are most is a nullity of the made judgment in taken the most of plea filed in with these and the interested Counsels Emmy a jury to enter the Summary the."

I jury the judgment and a motion was judgment was entered in the order in form of the plaintiff.

This time is true in the wondering that the 1st of complaints does not clarify with the process upon which the motion sought to strikes the amended affidavit of merits from

the files, we are inclined to rest our decision upon the point made by plaintiff that the affidavit of merits did not specify the nature of the defense which the defendant relied upon in compliance with the statute.

In the reply brief filed by counsel for plaintiff in error it is insisted that the stricken affidavit of merits does not meet the requirements of the Practice Act and that "this is the question we are asking the court to pass upon." We think the affidavit of defense was insufficient upon its face.

In Perry v. Kranz, 166 Ill. App. 1, it was held that an affidavit of defense should state facts disclosing elements of a substantial defense so that if false affiant could be convicted of perjury. The affidavit upon its face does not state ultimate facts which, if shown to be true, would authorize a judgment in favor of the defendant. The affidavit states that appellee's services were rendered about the defense of other parties than Rosehill Cemetery Company and upon employment of attorneys representing other defendants than Rosehill Cemetery Company; that the services rendered were against the interest of the Rosehill Company and for the benefit of others and were rendered for certain managers of Rosehill Company and for and on behalf of said managers in fraud of the rights of Rosehill Cemetery Company. These and other allegations of the affidavit state conclusions only.

It has been held that an affidavit of defense need not set forth the evidence upon which the defendant relies in support of his defenses and that only ultimate facts upon which a defense is based should be alleged therein. In the present case, however, no effort was made in the affidavit to disclose any ultimate facts upon which the defendant relied, except by statements, which in effect merely set forth that the alleged

services were rendered for others than the defendant and were rendered in fraud of the rights of defendant. Who those others were, or in what manner the employment of attorneys was in fraud of the defendant is not set forth.

It is also stated in the affidavit on information and belief that the charges for the services rendered were excessive. No attempt is made to indicate in this connection what services in fact were rendered or their value. Indeed, this part of the affidavit seems to be in conflict with conclusions in the affidavit that the services were not rendered for the defendant at all.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

173 - 25049

PEARL A. WILSON,
Appellee,

vs.

JOLIET & EASTERN TRACTION COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

214 I.A. 665

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the plaintiff for the sum of $750 rendered by the Superior Court of Cook County in an action for personal injuries brought by plaintiff against defendant, Joliet & Eastern Traction Company.

The plaintiff sustained injuries as the result of a collision, which occurred about midnight of July 4, 1917, between a street car operated by the defendant and an automobile in which plaintiff was riding as the guest of one Von Berge.

The evidence introduced upon the trial shows that the plaintiff on the night in question accompanied Von Berge to a dance held in the city of Matteson; that on leaving the dance hall they entered Von Berge's automobile which had been standing on Locust street in front of the hall; that Von Berge backed the automobile in a southerly direction to Third street and thence in a westerly direction on Third street over and upon street car tracks which were laid down therein, until his car was pointed in an easterly direction on Third street.

The evidence is contradictory as to what occurred from the time that the car backed around the northwest corner of Locust and Third streets. There seems to be no dispute in the evidence that there was an unobstructed view westerly from the place where the car stopped for a distance of about 1800 feet.

There is evidence in the record from which it may be

inferred that both Von Berge and the plaintiff had some knowledge of the conditions and structures at the intersection of the two streets and of the fact that a street railway line was operated on Third street.

In testifying the plaintiff said that as the automobile reached Third street both she and Von Berge looked around to the west and that she did not see nor hear anything; that before starting Von Berge had turned on the rear light of the automobile; that she saw the light burning before she entered the car. Her testimony is strongly corroborated by that of an apparently disinterested witness, one Sorenson, who testified that he saw the automobile backing down Locust street and around onto Third street; that when the automobile got on Third street it stopped and that Von Berge shifted the gears; that the automobile then started to move eastward on Third street and had about crossed Locust street when it was struck in the rear by an eastbound street car; that he, the witness, heard the brakes of the street car applied after the collision.

The motorman of the street car testified that when his car was about 50 feet west of Locust street the automobile backed into the street from the north and started west onto the car tracks. Witnesses for the different parties directly contradict each other as to what happened just before and at the moment of the collision. Whether the plaintiff was in the exercise of ordinary care for her own safety at the time of the accident or whether the accident was brought about by the sole negligence of the defendant's servants were questions of fact which were properly submitted for the determination of the jury. Under the evidence it was the exclusive province of the jury to pass on these questions.

Conceding all that is claimed by counsel for defendant as to the law with relation to imputed negligence sufficient

interest that with one hand and the circuit can meet requirements of the municipal and determined at the interpretation of the six adverse; it is the fact that this a direct relative line has operated in their street.

In installing the circuit will just as the relationship through street which was not its better placed around to the work and that the one and other circuits. Such a case exists- ing the temp had taken on the year light of the municipal that and the light building which acquired the. The fixed- made in electric circuit or that is equivalent illuminating street. The street. The facilities that in was the municipal lamps. The street street and always was light street that the municipal is or other street is required has the Dodge allied the place that the municipal line equipment in many municipal or their street and work street lamps street street is not always to be municipal street that lamp. The street. Start the street is the municipal street.

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Commissioner of lamp is charge of municipal the municipal and of the lamp street municipal.

evidence was submitted to the jury on behalf of the plaintiff to warrant the jury in finding, as it evidently did, that the collision was the result of the sole negligence of the defendant's servants.

While the version of the occurrence given by plaintiff's witnesses is directly contradicted by that of the witnesses for defendant, we are unable to say that the conclusions of the jury thereon are so manifestly wrong as to authorize a reversal of the judgment. No point is made that the court erred in instructing the jury or in its rulings on the admission of evidence.

The judgment of the Superior court must be affirmed.

AFFIRMED.

23 - 24420

MARIE LARSON, Assignee,
Plaintiff in Error,

vs.

HANNAH UMBACH, Administratrix
of Estate of John F. Umbach,
deceased,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

214 IA 665 4

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment of nil capiat and for costs entered on the verdict of a jury directed by the trial Judge after vacating a judgment by confession theretofore entered.

As the document designated in the abstract of record as the "bill of exceptions" has on motion been stricken from the record, nothing but the statutory record remains before us for review.

Whether the ruling of the court excluding as a witness Emil A. Ottinger, who brought the suit and afterwards assigned the judgment entered by confession, was erroneous, we are not, in the condition of the record, privileged to pass upon. The statutory record shows that the cause was in the first instance a judgment by confession; that on defendant's motion he was let in to plead and the judgment ordered to stand as security with a stay of execution. Thereafter the defendant died, and on suggestion of his death his administratrix was substituted. Ottinger assigned the judgment by confession to Mary Larson and on motion she was substituted as plaintiff. A trial was had before court and jury, which resulted in a verdict for defendant, and plaintiff moved for a new trial, which was granted, and the judgment now before us for review is the one entered upon the second trial of the case.

The only question which the condition of the record permits us to review is the action of the court in granting the motion of defendant to be let in to plead.

We cannot say from the partial abstract of the affidavit supporting the motion that it was an abuse of judicial discretion for the trial Judge to let in the defendant to plead and defend on the merits. Courts of review rarely interfere with the exercise of such discretion, especially where the defense permitted to be made has succeeded. In Wyman v. Yeomans, 84 Ill. 403, the court in referring to judgments by confession said:

> "As to such judgments, it was held in Lake v. Cook, 15 Ill. 353, courts of law exercise an equitable jurisdiction, and, as was there said, 'it is necessary to justice that courts of law should possess and liberally exercise that jurisdiction.'"

As we cannot say that it was an abuse of judicial discretion to let the defendant in to plead to the action, the judgment of the Municipal court must be and it is affirmed.

AFFIRMED.

27 - 24543

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. MARIE SIEGERDT, Defendant in Error,

vs.

FLOSSIE DAVEY and ROBERT DAVEY, Plaintiffs in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

214 I.A. 666

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a habeas corpus proceeding in which the relatrix seeks to recover possession from the respondents of an illegitimate boy child of whom she is the mother. The respondents, most exemplary people, have had the custody and nurture of the child from the time it was about two weeks old. They have cared for him as their own natural child and have trated him with parental affection. The relatrix surrendered the child to respondents at a time when she was unable to care for him. She was a working girl and had no home to which she could take the child and was unable to support the child or find anyone except the respondents who would receive and nurture him. At the time of the birth of the child she was in the home of her betrayer, a married man with a wife and two children, and all the interested parties were evidently anxious to shift the responsibility and care of the little stranger upon others. The respondents having no child of their own, the prospects of Mrs. Davey having any children in the future being, according to respondents' testimony, somewhat doubtful, and desiring a child in their family, and seeking for one and hearing of relatrix and her child, sought relatrix with the intention of taking the child for adoption.

That it was the intention of relatrix and the respondents that the child should be adopted is, we think, reasonably inferable from the evidence. However, through negligence on the part of respondents the child was never legally adopted by them. The

214.1.666

[illegible]

[illegible]

[illegible]

circumstances of relatrix thereafter changed. Her maiden name was Marie Block; the child in controversy was named Robert Block and was born January 14, 1915. Relatrix on December 1, 1917, was married to Henry C. Siegerdt, and being then in a position to care for her child she desired and sought its custody. The respondents were unwilling to surrender the child, and on June 3, 1918, the petition for habeas corpus in this case was filed, which respondents resist. Respondents answered the petition and there was a hearing and a judgment remanding Robert Block to the custody of his mother, the relatrix, the court finding that the relatrix was entitled to his custody. From this judgment respondents prosecute this appeal, asking a reversal of the trial court's judgment on two grounds: First, that relatrix is an unfit person to have the custody of the child, and, second, that relatrix abandoned the child to the respondents. It is also urged that it is for the best interests of the child to remain with its foster parents on account of their being better circumstanced in life than relatrix.

While the better financial circumstances of respondents is a matter which is entitled to some consideration, it is entitled to but little weight unless it appears that the mother is unfit to have the care and nurture of her child or that she is unable pecuniarily to properly care for the child, or that her environment is such as to be detrimental to either the morals or health of the child.

We cannot say from the evidence that any of these conditions is present in this case. The morals of relatrix are attacked because of her lapse from sexual virtue with a man who was married. Suffice it to say that it is in evidence that relatrix did not know that her betrayer was married until after she became pregnant by him, and that she surrendered herself to him under a promise of marriage.

Relatrix's husband was divorced from his former wife upon the ground of his cruelty to her, and it is therefrom argued that his nature by reason of such acts of cruelty was not such as to make him

[illegible] of relative importance [illegible]. Low wages [illegible] [illegible] [illegible]

a proper person to associate with his wife's child; and further, that relatrix was guilty of writing letters of affection to her husband while he was still the husband of another woman and undivorced. While these acts upon the part of relatrix are not to be commended, we do not think they are sufficiently serious to disqualify her to have the custody and nurture of her own child. Aside from the lapse from virtue which resulted in the birth of the child in controversy there is nothing in this record which can be construed as adversely affecting the morality of relatrix.

The question now remaining to be decided is: Has relatrix forfeited her right to the custody of her child by abandonment? It is true that relatrix, once in the name of Carpenter and again in her maiden name, signed consents to the adoption by respondents of her child. However, these were not acted upon before the filing of the petition for habeas corpus. Had adoption proceedings been prosecuted to finality, as they might have been with these consents in hand, relatrix would have been foreclosed from asserting any right to the custody of her child, but until these consents were acted upon and the conditions of the parties thereby changed, the law gave relatrix the right to change her mind. The signing of these consents to adoption are in no way a bar to the present proceeding by relatrix for the custody of her child. As held in People v. Bryson, 203 Ill. App. 325, the mother of a child is its natural guardian and custodian, and her right will not be infringed or curtailed unless there is something in her life and conduct which makes her an undesirable character to be entrusted with its care and nurture.

As said in case supra on a former appeal in an opinion by Mr. Justice Barnes, 198 Ill. App. 171:

"The law jealously upholds and protects that right (the mother's right to the custody of her own child) unless it has been forfeited by absolute relinquishment or some course of conduct or conditions that render its assertion incompatible with parental claim and the child's best interest. * * * Compared with her natural rights, the strain upon the feelings of the foster mother in parting with the child, hard as it may be, cannot be considered."

These observations are apt and applicable to the instant case.

We do not think the proofs warrant the court's finding that relatrix abandoned her child to respondents. She surrendered the child to respondents for care and nurture, and while respondents had the opportunity during the period of more than three years, while relatrix was unable to care for her child, to adopt the child as the law directs, their failure to avail of such opportunity deprives them of the right to retain the custody of the child as against its mother.

It is true that the circumstances of relatrix and her husband are humble, that he has a charge against him for alimony payable to his former wife of six dollars a week, which, as the record shows, he has to the time of the trial successfully avoided paying; that he has had many places of employment, which may have been his misfortune and without any fault on his part, yet the record shows that he has always had employment and that at the present time he has permanent employment at a salary of eighteen dollars a week in a prominent grocery house in Chicago. While the circumstances of relatrix and her husband are humble, it is to this humble condition of life that the child of relatrix was born, and as held in Cormack v. Marshall, 211 Ill. 519, poverty is not regarded as an element of unfitness.

There is no reversible error in this record and the judgment of the Circuit court is affirmed.

AFFIRMED.

Mr.Presiding Justice Dever dissents.

Mr. Presiding Justice Dever dissents.

56 - 24901

C. A. WALTHER,
Defendant in Error,

vs.

CHICAGO ENGINEERING AND MACHINE WORKS, a corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

214 I.A. 666

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The writ of error in this case brings before this court for review the trial court's action in denying defendant's motion to be let in to plead and for a trial on the merits, where a judgment by confession for $1094.27 and costs had been entered.

The particular matters urged for reversal are the refusal of the court to open up the judgment and let the defendant in to plead and defend the action, and the alleged irregularity in entering the judgment at the May term, when the narration was filed to the June term.

Taking these questions in inverse order, it is sufficient to say that the power of attorney authorizing the entering of the judgment, as well as the cognovit filed by the defendant's attorney acting under that authority, released and waived all errors which might intervene in the entry of judgment. Such release of errors is effectual to cure the error - if it was an error - in entering the judgment at the May term instead of the June term of the court. The rule is that where a cognovit filed in virtue of a warrant of attorney releases all errors that may intervene in the entering up of the judgment, the confession of the judgment is of itself an operative release, effectual for all purposes, and no formal plea of release is necessary. As said in Hall v. Jones, 32 Ill. 38, "a conclusive answer to all the ob-

jections urged here is, that this judgment was confessed in open court, and it is a legal presumption that the authority to confess it was judicially passed upon by the court. Roundy v. Hunt, 24 Ill. 598."

The note in suit was given, as alleged in the affidavits, in pursuance of an agreement between plaintiff and one Charles H. Babb regarding shares of stock in a corporation known as The Central West Manufacturing Company, providing among other things that plaintiff shall be appointed a director of that company. The agreement is set forth in haec verba in one of the affidavits, and nothing appears therein regarding any consideration to defendant for the note in suit given in pursuance of the agreement in such affidavit recited. It is claimed in the affidavits that no consideration was received by the defendant company for the note upon which the judgment before us was confessed, that it was executed and delivered without authority of its board of directors; that so far as defendant is concerned, the note was given in the interest of Babb and, as between plaintiff and defendant, the note is accommodation paper, issued without consideration to defendant; that the note given did not concern the business of defendant, nor was it in satisfaction of any debt or obligation due from defendant to either plaintiff or Babb. In these circumstances, defendant having made out a prima facie good defense upon the merits, it was a clear abuse of judicial discretion for the court to refuse to let the defendant make such defense, if he could, upon a trial of the case upon issues joined by appropriate pleadings.

In the early case of Pitts v. Magie, 24 Ill. 610, it was held that where, on the application of a defendant to open a

[illegible] stated here is, that this judgment was overturned in open court, and it is a fair presumption that was motivated in consequence of the judicially learned opinion by the court. Dennis v. [illegible], 24 III. 244.?

The case in hand was given, as stated in the activity, in pursuance of an agreement between plaintiff and one Charles J. Hart trustee under of which is a corporation known as the Central Hart Manufacturing Company, providing among other things that identity shall be received a director of such company. The argument is not true in some cases of the activity, and letting separate industry regarding and consideration to determined for the case is will given in proportion if the agreement is much activity well. It is claimed in the activity that no investigation was received in the defendants company for the case also which the judgment before is was contested. Hart is was examined and declared against authority of the court of litigation; that as far as defendant is concerned, the case was given in the interest of Hart and, at further judicial and defendant. The note is unmanageable paper, leaving without principles in defendant; that the note given in not security for business of activity, but was in a satisfaction of our debt or relinquishes the from defendant in action plaintiff or debt. In cases circumstances, defendant having made out a prima facie per defense upon the notice, it was a clear abuse of judicial discretion for the jury to refuse to let the defendant make such defense. If the court, upon a trial of the case such issues joined or stipulations already.

In the matter case of Little v. Hogle, 24 III. 351, it has been that clearly, on the application of a defendant to open a

judgment by confession and to be let in to defend, the affidavits show a defense which if substantiated would be good, and that a question is presented for submission to a jury, it is the duty of the court to permit such defense to be made.

In Oettinger v. Levit, 186 Ill. App. 104, it was held that where affidavits submitted in support of a motion to set aside a judgment prima facie show a good defense to the action, it is the duty of the court to permit an issue to be formed and the defendant to present his defense, leaving the judgment to stand in the meantime as security.

In Hannan v. Biggio, 189 ibid 460, it was held that when it appears from affidavits that no consideration passed for the note upon which judgment was confessed, such judgment should be vacated.

It was error for the court to refuse to stay execution with leave to defendant to make a defense upon the merits.

The execution and delivery of the note in suit is challenged by the affidavits on the ground that the act was ultra vires the powers of the defendant corporation. This presented a triable issue.

In re Prospect Leasing Co., 250 Fed. 707. In 10 Cyc. 1115, it is said that "judicial authority is nearly unanimous to the effect that a corporation has no power to make, to indorse, to accept, or otherwise to become liable upon commercial paper for the mere accommodation of another person or corporation."

In re Prospect Leasing Co., supra, the court said:

"It is argued that the indorsement by the corporation of these latter notes was for accommodation purposes, and therefore void as ultra vires. The rule is, of course, fundamental, that a corporation has no implied power to make accommodation paper. To hold otherwise would be to allow the corporate funds to be devoted to other purposes than those indicated by the

judgment by estimation and is so left to jurors. The attorneys
show a defense which if substantiated would be good, but that a
question is presented for determination by a jury, it is for every of
the court to permit such defense to be made.

In Gallagher v. Jarvis, 188 Ill. App. 324, it was held
that duty attorneys employed to appear at a trial in the
small claims court <u>after</u> they have been retained by the parties,
it is the duty of the judge of the court to permit an issue to be framed and
the defendant to present his defense, leaving the judgment be-
ground for the plaintiff to recover.

In Cannon v. Jones, 58 Ill. App. 3d, it was held that
when it appears from affidavits that an continuance should be
the main upon which judgment has been entered, such judgment should
be vacated.

It was error for the court to deprive a duly recog-
nized attorney of defendant in order to defraud upon the public.

The executive and delivery of deed made in well in
consideration of the attorneys so can cannot take the place of the
right for proof of the defendant contention. This presented a
triable issue.

In re Prudent Lumber Co., 80 Fed. 547, 1 Ill App.
3d. It is held that "judicial authority is hardly questions to
the extent that a corporation has the power or not. In answer, to
answer, it is sufficient to assume that a corporation cannot act
the mere assumption of corporate powers or capacities."

In re Prudent Lumber Co., supra, the court said:

"It is argued that the instruments by the corporation
of those (later) notes was for misrepresentation purposes, but there
does not be proof. The rule is, of course, (underlined),
that a corporation has no inherent power to make misrepresentation
proof. It also requires which it be alert the corporate (made
to be carried to such purpose some have indicated of the

charter, thus violating the fundamental agreement between the shareholders. In Cook on Corporations (7th ed., vol. 3, 774, it is said to be a well established rule that a corporation cannot ordinarily be bound by its signature to or indorsement or guaranty of the note or paper of another person for the accommodation of the latter. The directors are authorized by the stockholders to do business for corporate purposes, but are not authorized to use the corporation to perform acts of friendship or accommodation to others. The general rule is that the accommodation indorsement, signature, or guaranty of the corporation is illegal and cannot be enforced."

In 7 Am. & Eng. Encyc. of Law, 793, it is said that -

"By the overwhelming weight of authority, a corporation has no power to issue or indorse, for the accommodation of others, bills or notes in which it has no interest, unless, as is seldom, if ever, the case, such power is expressly conferred."

The Superior Court therefore erred in denying the motion of defendant to be let in to defend the action, and that order is reversed and the cause is remanded to the Superior Court with directions to sustain the motion of defendant, to allow the defendant to plead the matters set forth in the affidavits as a meritorious defense to the action, and that pending such trial execution on the judgment be stayed and that the judgment stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

67 - 24916

ROBERT STEVENSON & COMPANY, a corporation, Appellant, vs. WILLIAM H. DWYER, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 666[3]

MR. JUSTICE HALDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment of nil capiat and for costs.

In the condition of the abstract we will not, under repeated rulings of this court, review the record. The abstract is the pleading of the parties, from which, without reference to the record, error must appear as a sine qua non to an interference with the judgment appealed from. The abstract contains no information regarding the statutory record. The cause of action, the nature of the claim, the condition of the pleadings, are not disclosed by the abstract. To ascertain these essential matters recourse must be had to the record. To the record we will not go in search of error to reverse. The proceedings come before us with a presumption of their verity and that presumption cannot be overcome unless from the abstract it can be said error appears calling for a reversal. All that appears in the record regarding the action is: "Praecipe and Statement of Claim," "Summons," "Appearance and Affidavit of Merits," without giving any inkling of their contents. Then follows an abstract of certain orders and the bill of exceptions. This is wholly insufficient and does not comply with Rule 18 of this court, which requires "a complete abstract or abridgment of the record." Matos v. Barnheisel, 212 Ill. App. 489; Manning v. Tobey Furniture Co., 211 ibid. 522, and cases there cited. We will search the record for reasons to affirm but not to reverse.

For the insufficiency of the abstract as above pointed out, the judgment of the Municipal court is affirmed.

AFFIRMED.

77 - 24932

GEORGE J. COOKE COMPANY,
a corporation,
Appellee,

vs.

GOODRICH TRANSIT COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

214 I.A. 666

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action for damages for negligence alleged against defendant in the transport of certain barrels of beer, plaintiff on the verdict of a jury had judgment for $123.13 and defendant appeals.

It appears that 50 half-barrels of beer were consigned by plaintiff to Charles Schalletz of Milwaukee and delivered to defendant for carriage from Chicago to Milwaukee by its boats on Lake Michigan. The beer was delivered about January 25, 1917. The consignee at Milwaukee did not accept the beer and it was returned on order of plaintiff, 47 of the barrels being dry and minus beer when received by plaintiff.

Plaintiff's evidence is lacking in any proof of negligent conduct on the part of defendant in the handling of the barrels of beer in question. Negligence seems to be assumed from the fact that the beer was in some way lost out of 47 of the barrels. The president and general manager of plaintiff testified that there was only one thing that would make the corks blow out, and that is great pressure from the inside, and that such pressure could only be obtained in beer through freezing; that if it is in glass bottles it will break the bottles, but in wooden barrels it will force the corks out, and that the corks of the 47 half-barrels were blown out. This witness, being the only witness produced to testify for plain-

tiff, had two theories which might account for the blowing out of the corks of the barrels and the consequent seepage of the beer; one was that if the beer was subjected for two days to a temperature of 10 degrees above zero, it would freeze solid, and that beer must be frozen solid to blow the corks from barrels. The other theory is that beer not completely fermented put into air-tight packages and subjected to a temperature of 40 to 55 degrees will ferment, causing gas to form; that if the corks were blown out of these barrels with sufficient force to make the beer spout, it would be owing to excessive pressure in the barrels and the blowing out of the corks would be the result of the natural action of the beer.

Plaintiff did not prove that defendant had subjected the beer to a low temperature in its carriage or prove any other act of negligence which would have caused the loss of the beer. At the conclusion of plaintiff's case defendant moved for an instructed verdict, which was denied.

The evidence of defendant was to the effect that the temperature of the hold of the ship in which the beer was carried was between 40 and 60 degrees Fahrenheit. In the light of this evidence the natural conclusion is that the corks were forced out of the barrels by the fermentation of the beer and that such fermentation is not traceable to any negligent act of defendant. In the condition of the proofs at the conclusion of plaintiff's case, the motion for an instructed verdict should have been allowed, as plaintiff made no proof of any negligent act on the part of defendant to which could be traced the blowing out of the corks of the barrels and consequent loss of the contents. Without proof of negligence plaintiff was not entitled to recover. The whole proofs considered point to but one conclusion, which is that the blowing out of the corks and loss of the beer are

light, but the theories which relate spectra to the sizes and of the units of the bodies and the corresponding energies of the light; yet one look at the book was sufficient for me daze in a twinkling of an eyelash above were. He would freely write, and that been made to frames which to give the media from ex-tolle. The other matter is that some not sufficiently informed the into air-light phenomena was published in a temperature of as to it between will Tarnard, leaving one in fears, that if the water were given out of close service with motions force to make the best equal, it would be wonder to measure pressure in the battery and the flowing out of the water would be the ex-act of the pendent motion of the beam.

Finally its not years that scientists had ad-justed the rays to a low temperature in the matters as press my also for of experiments which have passed the laws of the heat. In the mechanism of physicists near determined range for an intricate total, which was denied.

The science of instrument was in the effect that the temperatures of the data of the many in which the water was matters and taken by and by engines instruments. In the light of some efficiency the natural simplication is that the media were fixed and of the length by the formations of the heat and that meas temperature is not increasing to the negligence and of instrument. In the minimum of the pressure at the measurements of physicists were. The in-ition the to measurement matter which have been di-tance, as physicist made at great of the negligence and as the part of instrument to which would be tested the flowing and of the area of the battery and measurement time of the matters. Effec-ent great of mechanism physicist and not matters to treatment. The other pressure instrument point is had are matters, which is that the flowing out of the water and time of the heat and

attributable to the fermentation of the beer engendering gases which forced the corks out. Taking into consideration the time of year and the mode of conveyance, it cannot be said that it was negligence to carry the beer in the hold of the ship, where the temperature was between 40 and 60 degrees Fahrenheit.

For the error in not allowing defendant's motion for an instructed verdict in its favor, the judgment of the municipal court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

77 - 24932 FINDING OF FACT.

The court finds as an ultimate fact that the loss of the beer from the half-barrels did not result from negligence of defendant.

Petition denied

105 - 24963

WOMEN'S CATHOLIC ORDER OF FORESTERS, vs. HELEN DOMKE, Appellee, ANNA QUAIVER, VICTORIA BRZEZINSKI and JAMES F. BISHOP, Administrator of the Estate of STANLEY HUEBNER, deceased, Appellants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

214 I.A. 665

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a bill of interpleader from which, and from the evidence in the record, it appears without serious dispute that the Women's Catholic Order of Foresters issued a certificate of insurance to Angelina Huebner, a member of the order, for $2,000, wherein her children, Lena (Helen) Domke, Anna Quaiver, Stanley Huebner and Victoria Brzezinski, were named as beneficiaries; that thereafter, on January 30, 1914, in accord with the written request of Angelina Huebner a new certificate was issued and the foregoing certificate surrendered, naming Helen Domke (appellee) sole beneficiary.

Angelina Huebner died April 1, 1914, and as there were disputes among the four children as to whom the money due under the policy should be paid, the Foresters brought the matter into court by a bill of interpleader, making the four children parties defendant and leaving them to set up their rights for determination by the court. The Foresters paid $2,000, the amount of the policy, into court, less its solicitor's fees and costs. The defendants answered, Helen Domke claiming that the whole of the $2,000 was payable to her under the terms of the policy. The other defendants claimed that the money was impressed with a trust

in virtue of an agreement made, when the policy was changed, between Helen Domke and her mother, the insured, by which the money should be divided equally among the four children, with the exception of Stanley, whose share, owing to his drinking habits, was to be withheld until he had "become a better person."

Since the filing of the bill by interpleader Stanley Huebner departed this life and James F. Bishop, administrator of his estate, was substituted as a defendant in his stead.

All of the contestants admit that the amount of the policy was impressed with a trust. The dispute relates as to just exactly what that trust was. Helen Domke insists that her mother, Angelina Huebner, designated her as the sole beneficiary because her mother desired that out of the $2,000 she should pay for a monument over her mother's grave, and also pay the expenses of masses to be said for the repose of her soul. The other parties contend, and the master found from the proofs, that Helen Domke was named as the sole beneficiary in the policy with the understanding between her and the insured that upon receiving the proceeds thereof she would distribute the same equally among her brother, her two sisters and herself; and that a trust was created by Angelina Huebner and Helen Domke under the terms of which Helen Domke was to receive the proceeds of the certificate of insurance and distribute the same equally among the children of Angelina Huebner - Anna Quaiver, Victoria Brzezinski, Stanley Huebner and herself.

It is argued that the attack upon the claim of Helen Domke for the proceeds of the certificate of insurance upon the life of her mother is an attempt to change a written instrument by parol proof, which the law will not sanction. However, it is patent from the record that the conditions and terms of the cer-

in virtue of the agreement made, since the policy was changed, so-
ciety judges people and not matters, the lawyers, or rather the arra-
nged be divided equally among the four contrary, with the ex-
ception of theory, some cases, which is the opposing counsel.
was in ex-Indeed merit be not "Pleaded a higher system."

Since the filling of the will by Jeremiah Bentham
Philosophy inspired this life and Jeremy I. Bentham, administration of
his duties, was administrated as a lawyhem in his areas.

All of the conveyancing which has the manner of the
policy was supposed also a trust. The Chancery estates as I just
usually said that trust was. Being Judge Jeremy that law actually,
Adopting the court, Institutional is of the main jurisdiction Chancery
the medical Jeremy that was of the Jeremy, the manner and for a
measure, was an actual's cases, not also the expression of
matters is to said for the system of law most. The other written
opinion, was the lawyer found from the gravity, that judge Judge
was found to the this Jeremy's in the valid with the mater-
ial Jeremy Bentham the and the Jeremy that open inventing the pen-
sions Jeremy. The main determine the mean equally among his
brother, but the estates was Jeremy; not that a lawyer and equals
of Bentham Jeremy and right Judge under the Jeremy of other Jud-
Judge was to provide the property of the Jeremy's of property
and Jeremy's all mean equally among the children of majority
Jeremy - Jeremy Jeremy, Chancery Jeremy's. Jeremy Jeremy and
property.

It is opposed lower the estate upon the claim of Jeremy
Judge for the property of the Jeremy's to Jeremy since the
life of the Jeremy is not allowed to change a majority influence of
party right, Jeremy the law will not mention. However, it is
partial. Then the rights and the conditions and Jeremy of the ren-

tificate of insurance are in no manner attempted to be varied by the proofs. In fact, the certificate itself is not attacked, nor are any of its provisions or conditions. It is, however, sought to impress upon the fund payable under the terms of the certificate a trust in favor of all the defendants to the bill of interpleader.

The decision of the chancellor rested in the holding that there could be no trust impressed upon the money due under the insurance certificate for the reasons that when a certificate is changed no parol evidence can be considered regarding it, and that a written instrument cannot be varied by parol.

These reasons are not well assigned, because there was no attempt to vary the terms of the insurance certificate, and in State Bank v. Barnett, 250 Ill. 312, it is expressly decided that a trust in the money payable under a certificate of insurance similar to the one in the case at bar could be established by parol. The court said:

> "Had appellant been able to establish by competent evidence the situation disclosed by the pretended statements of W. A. Barnett, she would have established the existence of a parol trust, as claimed."

In Catland v. Hoyt, 78 Maine 355, which related to a certificate of insurance in the United Order of the Golden Cross and in which there was a controversy as to whether a trust was impressed upon the proceeds of the certificate, on the question of the power to impress a trust by parol as being contrary to the terms of the certificate, the court said:

> "The oral evidence was not in conflict with the written contract. It was offered, not to vary or control the contract between the deceased and the insurance company, but to show another and an independent contract between the deceased and the defendant. It was offered, not to show that the defendant was not to receive the money, but to show what he was to do with it after receiving it. For this purpose it was clearly admissible."

affidavits of investment are in no manner privileged to be evaded by the courts. In fact, the certificate itself is not intended, nor does any of its provisions or conditions. It is, however, sought to argue upon the final question under the issues of the certificate a right in favor of all who participated in the sale of insurance.

The decisions of the commissioner rested in the belief that there could be no issue upon the ground that the insurance was another the insurance certificate for the reasons that there was a certificate is changed or legal relations was in consideration of the. Not that a certain instrument should be varied by parol.

These grounds are not well taken. However there was no attempt to vary the terms of the insurance contract. and in State ex rel. Bennett v. Bennett, 60 Ill. 371. It is universally decided that a trust in the money payable under a certificate of insurance which is the was in the form of law shall be established by parol. The court said:

> "The appellees have also to establish by evidence the relations that attached to the insurance certificate at the. Certainly, not only have explained the relations of a parol trust, or claimed."

In Bennett v. Burr, 39 Ohio St. 362, which relied on a certificate of insurance in the United Order of the Golden Cross and in which there was a contract on the written a trust was impressed upon the payment of the certificate. In the decision of the court in upheld a trust by parol as which existed in the terms of the certificate. The court said:

> "The real difficulty has not in dispute with the policies. It was affirmed, but the only of benefit the insurance company, the beneficiary and the insurance company, but by some condition and the insurance contract between the insured and the difference. It was affirmed, yet in some that the beneficiary was not to receive the money, but to hold it for the benefit of other beneficiaries. The trust instead is not clearly admissible."

That is exactly the question in the instant case. There is no controversy as to Helen Domke's right to receive the insurance money under the terms of the certificate, but the question is, what was she to do with it when she did receive it.

Having decided that a trust in the money payable under the insurance certificate can be established by parol, it remains for us to decide as to the weight and force of the evidence in the record and proper to be considered, establishing such trust, and whether such evidence establishes the trust claimed by Helen Domke or that contended for by her co-defendants in this proceeding. In the first place, we have some inkling of the mind of the mother of these four children when the original certificate was issued, which was payable to her four children. The purpose of the change is proper to be considered so far as the proofs show. Helen Domke contends that the change was made for the purpose of having the proceeds used to erect a monument upon the mother's cemetery lot, to keep the lot green and to pay for the saying of masses for the repose of her soul. This contention is rather refuted from the fact that Mrs. Huebner died leaving a comfortable estate, which Helen Domke administered under letters granted to her and that the inventory filed by her showed such an estate, and her account signed by her and approved by the court showed disbursements made for the saying of requiem masses for Mrs. Huebner.

Testimony regarding declarations of Mrs. Huebner prior to the changing of the beneficiary in the certificate was inadmissible as evidence. Helen Domke was not a competent witness and the evidence regarding Mrs. Huebner's declarations prior to the changing of the certificate if admissible was overcome by countervailing proof. What was said, however, by Mrs. Huebner at the time of the

issuing of the certificate changing the beneficiary and the reasons therefor was proper to be proven by competent witnesses. It is clear that the main reason for changing the certificate was Mrs. Huebner's fear that her son Stanley would, owing to his drinking habits, squander his share of the money, unless, to use her words, "he became a better man." This was the main reason moving Mrs. Huebner to make the change. It was still her desire that all of her children should share the money payable under the certificate and that Stanley's should be withheld until he quit his drinking habits.

Subsequent to the death of Mrs. Huebner, Helen Domke, as was proven by the testimony of credible witnesses, stated that she was holding the insurance money for the four children. Helen Dybowski, Secretary of the Foresters, a Mrs. Petrie and a Mrs. Boeche, disinterested witnesses, each testified that Helen Domke admitted to them at different times subsequent to her mother's death that she was to divide the insurance money among the four children of her mother.

There was trouble about the testimony of Helen Dybowski, Secretary of the Foresters. She testified when first examined before the master that Helen Domke brought her mother to her regarding the changing of the certificate and that the mother then stated that she wanted it changed to Helen Domke, because she would not like to have her son get the money and spend it; that she could depend upon Mrs. Domke doing the right thing by her sisters and that she should keep the share of the brother until he turned to be a better man; and this witness admitted that she said to Mrs. Boeche that Mrs. Huebner said she wanted the policy changed so that Helen Domke would get the insurance money from the policy; that Mrs. Huebner said she wanted each one of her children to get $500, but the money of Stanley Huebner, $500, Helen Domke was to

finding of the participants regarding the overhearing and the reasons
therefor was proven to be given to manifest attention. It is
clear that the media helps the participants to overhear the
commercial from that but are identify which, which is the trading
basis, regardless the image of the model, clear. In the time
media. The reason a little more." This was the main remark writing
are, another is media has choice. If one still has doubts that
all of the criterion should place the model perceive behind the ad-
ditional and later identify should be attention model in that the
intention behind.

Disagreement to the model of ads. Confused, prior media.
We had asked to the respondent if should television. Asked that
the new technology the increase money for the ads facilities. Asked
preferred. Familiarity of the different, a lot. Media not a ads.
Benefit. Distinguished although. Most indicated that major media
exhibited to have an different video advertisement to the product's
image but are one is which the investment money where the four
conditions of the models.

There was another study the influence of media preferred.
Importance of the preferred. The respondent when first mentioned the
from the source that which media should the different of the
publishing the discussion of the participants and that the medium than
making that the model is mentioned to better image. However the media
not able to have the ads and for more or less cause in that the media
reasons upon ads. Image which the right fitting of the airtime and
that the should keep the times of the television which an attempt to
be a better model but still without realizing that the main is the.
Reason that the. Therefore well the, models the giving changing to
that often image which and the increase right of the industry
that the. Confused well the models that of the children in the
media, for the image of making reasons. Then, media which the to

keep until he became a better man.

After the findings of the master were known and at the instance of Helen Domke, Helen Dybowski was recalled as a witness by Helen Domke to correct, as it was claimed, her former testimony. Helen Dybowski claimed she was puzzled at the time of her first testifying, and then testified in a negative way in contradiction of her former testimony, swearing that Mrs. Huebner told her that she wanted Helen Domke to get all that money; that she mentioned about her son; that she would not like to have her son get the money and that she never mentioned anything about her other daughters; that she didn't mention anything about how the money should be divided or how Helen Domke should take care of that money; and when asked why she testified as she did before about the matter, she answered, "Because I was puzzled in some parts; that Mr. Boeche, when he was over to my home, he asked me whether Mrs. Huebner didn't say whether the money should be divided equally between the children, and that was the mistake on me, because she never said a word of that kind in my house. She didn't say anything about how the money should be divided."

This corrected testimony the master disbelieved. We think a careful analysis of all of Helen Dybowski's testimony warranted the conclusion at which the master arrived in regard to its credibility. He saw this witness, which the chancellor did not, and had opportunities not afforded the chancellor or this court in determining the weight of the evidence and the credibility of this witness. Furthermore, her original testimony is borne out by that of other credible witnesses and the substance of such testimony is corroborated by admissions of Helen Domke herself to third persons who testified regarding her admissions.

We agree with the master that the evidence of Helen Dybowski as originally given was credible; that her attempt to

great merit to become a saint too.

After the finishing of the martyr were taken out of the dungeons of Sylve Dunes, Jules Lafrenière was invited as a visitor to Sylve Dunes to witness. As it was finished, his friend Lieutenant. Jules Lafrenière claimed who was punished as his time of his first forfeiture. and then hesitated in a moments and in motions of the tiring investigator, mentioning that you. Lafrenière said that the mental torture but also that the world was like to have had got the notion and that the power exercised by priests above the other daughters; that the Church's machine worked not the time should have of time and money; and does raise dip the institution on the old before about the matter. who murmured. Therefore I was convinced in some point; that Dr. Jenner, when he was after he no time, to stand be drinking tea. Lafrenière dipped any thought the money should be divided equally between the children. all that the matter on me. Monsieur our water will a week of that said to my lawyer. The Church's was mentioned which the the money should be divided.”

This interview lasted the matter discussed. He also a medical analysis of all of Jules Lafrenière's children was because his ancestors of which has never worried to report on life availability. In our best interest, where the commission did not. and the circumstances are attached the commission to make court is accordingly the judge at the testimony and the stupidity of this witness. Nothingness, the original instances in principal to that of other mentally ill-behaved and the notwithstanding of such behaviour is accomplished in mischievous to mischievous of Sylve Dunes herself to this position the testified resulting her ministries.

He also with his mother that the witness of Jules Lafrenière as originally first was completely just the attempt to

contradict the same fails and that it is apparent that she was incited to contradict the testimony which she had given originally before the master by some ulterior motive and under influences which to say the least give rise to suspicion.

We agree with the master's finding that the credible admissible evidence establishes a trust in the money payable under the certificate issued to Angelina Huebner, making Helen Domke trustee of the fund, to pay the same in four equal portions - one to herself, one each to her two sisters and one to her deceased brother.

The decree of the Superior Court is reversed and the cause is remanded with directions to enter a decree in accord with the recommendations of the master's report directing the defendant Helen Domke as trustee to divide the fund paid into court equally among the defendants Anna Quaiver, Victoria Brzezinski, James F. Bishop, Administrator of the estate of Stanley Huebner, deceased, and herself.

REVERSED AND REMANDED WITH
DIRECTIONS.

113 - 24977

RAPP MOTOR CO., a corporation,
Appellee,

vs.

L. A. RUDA,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 667

MR. JUSTICE HALDEN DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. On a trial before court and jury plaintiff had a verdict and judgment for $754, and defendant appeals.

The only error urged upon us for reversal involves the instructions of the court to the jury as to the measure of damages. The objection to the court's instructions is made here for the first time. The abstract, which is the pleading of the parties in this court, has this notation immediately following the instructions: "No objections to the instructions." Then follows in orderly sequence the retirement of the jury from the bar of the court to consider their verdict. If there was any infirmity in the instructions it became the duty of counsel not only to object, but to point out to the trial judge whatever error was apparent and to suggest a proper corrective. Had this course been followed and any error pointed out by counsel, we will assume that the judge would have corrected the same by an appropriate supplement to the instructions before the retirement of the jury from the bar of the court. Not having so done forecloses defendant from raising the point here as an initial suggestion.

The record in its present condition presents no question for our review, and the judgment of the Municipal court is affirmed.

AFFIRMED.

125 - 24989

SAMUEL M. ASH, assignee of HARRY F. ROSE and JAMES R. COX, doing business as VAUDEVILLE PUBLISHING COMPANY, Appellant,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
TAI JUE QUONG, otherwise known as JUE QUONG TAI, Appellee.	

214 I.A. 667

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff in an attachment suit in which the attachment was quashed, the garnishee discharged and a judgment of nil capiat entered.

The suit seems to be based upon a judgment obtained before a Justice of the Peace of Oklahoma City district, Oklahoma County, State of Oklahoma, for forty-five dollars and three dollars and eighty cents costs against one Tai Jue Quong.

The transcript of the judgment with its accompanying certificates was proffered as evidence and excluded by the court on the ground that being a judgment of a state foreign to Illinois the transcript was not authenticated or exemplified according to the Act of Congress regarding the authentication of such records.

There is a variance between the name of the defendant in the proffered transcript and the name in which the defendant was sued in this proceeding. However, this is of no importance in the present condition of the record.

It is axiomatic that there is no presumption in favor of the jurisdiction of a justice of the peace. Such jurisdiction must be proven. In the instant case such jurisdiction must be determined by the provisions of the statutes of Oklahoma regarding

justices of the peace, if any such there be. We find none in the record. It is not a question of taking judicial notice of the statutes of a sister state. The statutes of Oklahoma regarding the jurisdiction of justices of the peace were necessary as evidence of the fact of such jurisdiction, and without such evidence there was nothing before the court which would warrant the admission of the proffered transcript.

Finding no reversible error in this record, the judgment of the Municipal court is affirmed.

AFFIRMED.

137 - 25006

LOUIS RICHARD, doing business as L. RICHARD & COMPANY, Appellee,

vs.

UNITED MILLS COMPANY, a corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 667

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant's second affidavit of merits was stricken from the files and a judgment as in cases of default was entered for $725, the amount of plaintiff's claim, and defendant appeals.

There is no controversy regarding the amount of plaintiff's claim; but defendant predicates its defense by making a counterclaim of $1320 for 12,000 fertilizer bags which defendant states it bought of plaintiff and paid for. It seems that controversies arose after delivery and payment regarding the bags and defendant claims that plaintiff agreed to accept a return of the bags and refund to defendant the amount paid for them; plaintiff, however, refused to refund or receive a return of the bags; that defendant holds the bags subject to plaintiff's order and that plaintiff is consequently indebted to defendant in the sum of $595, the difference between its claim and defendant's counterclaim.

Defendant did not ask for leave to file an amended affidavit of meritorious defense at the time its original affidavit was stricken, but asked and obtained leave to file a bill of exceptions embodying the proceedings on the motion to strike. Nine days thereafter defendant moved for leave to file an amended setoff instanter, which was denied. The action of defendant in this regard was tantamount to an election to stand

[illegible]

[illegible]

[illegible]

by its affidavit of meritorious defense. It was within the sound discretion of the court to deny, as it did nine days after striking the affidavit, the motion of defendant for leave to file an amended statement of set off. Harris v. Willis, 209 Ill. App. 401.

Under Sec. 23, par. 8, Municipal Court Act, error could not be assigned on this ruling of the court, as it related to a matter of practice in that court. McGuire v. Bransfield, 147 ibid 541. Leave was, however, granted defendant to file an amended affidavit of merits instanter, which, being filed, was afterwards on motion of plaintiff stricken.

We think the reasoning of Mr. Justice McSurely in Grossman V. Cohen, 207 ibid 156, that affidavits of defense, in an action in the Municipal court of Chicago, which present no allegations of fact, but mere argument or alternative statements, are properly striken from the files, aptly applies to the amended affidavit in the instant case.

Walter Cabinet Co. v. Russell, 250 Ill. 416, is an authority holding that extending the time for filing a statement of setoff is a matter of judicial discretion.

The action of the court in striking the amended affidavit of defense was justified, as this affidavit in no meritorious particular differed from the affidavit already stricken. It was argumentative and alternative in its averments and presented a claim entirely foreign to and disconnected from the claim which plaintiff sought to enforce, the justness of which was not in dispute.

The fertilizer bags involved in defendant's setoff had been bought and paid for and that transaction closed according to the statements in the amended affidavit. A new contract is there set up which might raise questions of consideration and the Statute of

by its activity or monitoring behavior. In some states the mental elements of the crime are simple, as it has been under other existing rule of liability, the nature of behavior for lower is title as required elements of the act. Morris v. Texas, 90 Ill. 102, 104, 41.

Under Sec. 23, par. 2, Illinois Penal Code, where would use be assumed on this ruling of the court, as is related to a matter of practice in that county. Jackson v. Commonwealth, 147 Ind. 321. Same was, however, greater behavior is title as mental activity of entire Instrument, which, using title, was affirmative on matter of principal elements.

In order the presumption of is, Jackson Commonwealth, in Morris v. Texas, 90 Ill. 102, that activities of Michigan, is as matter in the constitutional court of Illinois, which covered on affirmative of that, was some equivocal or alternative elements, are properly without that title. Opti. opinion is the mental activity in the instant case.

Under Indiana in. 2, Michigan, 90 Ill. 102, is an authority holding that activities the lower fit affirm a statement of author is a matter of judicial interpretation.

The nature of the court is stating the mental elements of behavior and judgment. As this activity is an affirmative issue particular difference from the activity element problem. It was dispositive and activity in the behavior and principal elements involved in mental element. Illinois principal essays in matters. Use judgment of which one will is intent.

The Particular main statute is indicative activity that been brought and pain for and that transmitter element essential in the elements in the mental activity. A new activity is lower and so which major issue question of constitutional and law element of

Frauds. It was not properly a matter for setoff against the admitted correctness of plaintiff's claim. The court in the exercise of its discretion was warranted in denying defendant the right to interject such claim into the cause by striking the affidavit from the files which set it up. The exercise of such discretion being a matter of practice in the Municipal court under the authorities supra is not subject to our review.

For the reasons stated the judgment of the Municipal court is affirmed.

AFFIRMED.

Finally. It was not primarily a reading for social amusement but authoritative commentaries of principality's claims. The years in the aftermath of the disaster had concentrated in varying degrees the minds of intellectual men claim more the power of principle than the first claim and it up. The education of such disciples having a course of practice is now emphasized every other the administration people is not another to our nations.

But the reading circle the journals or the intellectual people in attitude.

ARTICLES.

59 - 24906

ALBERT RUZIO, by his next friend, Andrew Ruzio,
Plaintiff in Error,

vs.

WM. LOWRY, WM. LOWRY & CO., and YOUNGER-DEVINE DAIRY CO.,
Defendants in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

214 I.A. 667

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On May 21, 1913, Albert Ruzio, then five years of age, received injuries through colliding with a milk wagon of the Younger-Devine Dairy Co., one of the defendants. He brought suit seeking to recover compensation, and upon trial the jury returned a verdict against him upon which judgment of nil capiat was entered. Plaintiff seeks to have this reversed.

The correctness of the verdict turns upon the credibility of the witnesses. In addition to the plaintiff himself there were two other eye-witnesses, who at the time of the accident were seven years old respectively; the trial took place about five years after the accident. The story of these children is directly contradicted by the evidence of the driver of the wagon, a Mr. Mueller. Without narrating all the details, the story by plaintiff's witnesses on several important points fails to convince. This is especially true with reference to the lettering on the wagon, the direction it was going, the conduct of the driver and the position of the wagon. We are of the opinion that the jury properly could accept the driver's statement, to the effect that he was going northward on the street at a slow trot when the plaintiff ran suddenly from the sidewalk against one of the front wheels of the wagon, which knocked him to the curb; that the driver at once stopped the vehicle and picked the

boy up and carried him to his home. The jury properly could conclude that plaintiff had failed to prove that the accident had happened through any negligence on the part of the driver, and that the accident happened solely through the heedless and unexpected conduct of the plaintiff.

Another element tending to cast doubt upon plaintiff's story is the attempt to make out that the injuries received were much more serious than the evidence shows them to have been.

Complaint is made of instructions given and refused, but we are of the opinion that the trial court did not err in this regard. The instructions complained of are stock instructions which have been repeatedly approved.

Under the evidence the jury could have brought in no other verdict, and the judgment entered thereon is affirmed.

AFFIRMED.

but he was worried lest in his mind. The lady pianist could con-
clude that plausibly had failed to prove that the musical and
aesthetic element was negligible on the part of the player, and
that the musical appreciation might contain the beautiful and re-
vealed amount of the plausibility.

Another element lurking in most minds was plau-
sibility every is the attempt to make out that the religious re-
ligious sets were more modern than the religious sense that is
more true.

Complaint is made of instructions given and refused.
But we did it the question that the right hours did not be in
more regard. The instructions complained of was that instruc-
tions which were been apparently correct.

Being the reason the just which were straight in
no other results, and the practical material history is critical.

APPENDIX.

78 - 24935

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HARRY KLEIN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 668

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, hereinafter called defendant, was arrested and tried upon the charge of being a vagrant, in violation of section 270, chapter 38, R. S. of Illinois (Hurd's). A jury returned a verdict finding him guilty, and he was sentenced for one year in the House of Correction and to pay a fine of $100. He asks that the judgment be reversed upon the ground that he was arrested without a warrant. We do not think this question is properly before us. The record shows that an information was duly filed on November 8, 1918, and a capias issued and served; that the defendant made no objection, and asked for a continuance to November 14th, and thereafter, upon his further motion, the case was continued from that date to December 3rd. It also appears that he gave bail for his appearance after he was arrested on the capias. We think that by thus submitting himself to the jurisdiction of the court he waived any question which might be raised concerning a warrant.

At the time he was taken into custody defendant was standing on a street corner in the company of a well known pickpocket. The pair were observed by two police officers, one of whom was familiar with the crime record of defendant, and questioned him. From the testimony of this officer it appears that with reference to his employment defendant stated he was a cigar maker.

When asked "where at?" he said, "No, I am not a cigar maker, I am a cigar salesman." In answer to further inquiry he replied, "I am not working at all," and to the inquiry as to where he had last worked, replied "None of your business."

Defendant, as was his privilege, did not take the stand in his own defense. In his behalf one Kentz, who stated he was in the fruit commission business, testified that the defendant was in his employ and had been working for him about four months, in the capacity of peddling to private customers. The witness did not know where defendant lived, and was not really sure of his name, nor could he produce any record of the alleged employment or the payment of wages to defendant. Opposed to this testimony was that of the officer above quoted, and others who, of their own knowledge, were familiar with defendant's reputation and past performances. There was no error in the admission of this latter evidence. People v. Fahy, No. 24392, opinion filed by a branch of this court March 18, 1919; People v. Smith, No. 24411, this court, opinion filed January 27, 1919.

Other points presented are without merit. We hold that the jury fairly determined the issues, and the judgment is affirmed.

AFFIRMED.

Sign manual "orders only" be held, "No, I am not a sight seeker, I am a sight detector." Or perhaps to further justify my refusal, "I am not willing at all," and to the inquiry as to where he had last worked, critical "none of your business."

Determined, as was his policing, his act take the stand in his own defense. On the subject his trials, was treated as was in the first consultation hearing. Certainly that the defendant was in his reality not had been nothing for him about that so-called. In the anxiety of wanting to private conversations. The witness all not have some difficult time, and was not really sure of his name, nor could he produce any records of the direct employees or the payroll of wages to defendant. Upon or this testimony was that it was effective delay judgment and there was, of fact not invalidly, some facilities was defendant's principle and just preferences. There was no error in the admission of this letter evidence. Tarrio v. Kemp, ex. ubiq., citing by a person of this court claim is, 1111; Harris v. Smith, ex. shall, this court, against first inquiry or, 1111.

Other points presented are without merit. We hold that the jury fairly instructed the issues, and the judgment is affirmed.

Affirmed.

117 - 24981

WILLIAM C. BACKOF,
Appellant,

vs.

ANTON J. CERMAK, Bailiff of the Municipal Court of Chicago, and NATHAN SCHWARTZ, a minor, by Harry Levy, his Guardian ad Litem,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 668

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff herein, trading under the name and style of "Banner Box Company," brought this suit against the bailiff of the Municipal Court and Nathan Schwartz, a minor, to determine the right to property levied upon under an execution issued against the defendant in the suit of Schwartz vs. Banner Box Company, a corporation, for the recovery of damages for personal injuries, wherein judgment by default was taken against the defendant in that case.

Plaintiff contended in the trial court and insists here that he was the sole owner of the Banner Box Company, that it was not a corporation, and that the personal property of an individual cannot be taken under a levy to satisfy a judgment obtained in a suit against a corporation. The defendants do not appear in this court.

The evidence was conflicting as to the use by plaintiff in connection with the company name on his building and trucks, of the words "Not Inc.," but the record shows that such words were not associated with the name "Banner Box Company" in either the Chicago City Directory or the Chicago Telephone Directory, nor did they appear on one of the dray tickets which was introduced in evidence. If, as admitted by plaintiff, the company name was adopted in lieu of his own name as a matter of convenience and because the

latter was hard to remember, we fail to see wherein he has been harmed through being sued in the name which in business he preferred to be called and known by. For anyone to have assumed that the "company" was a corporation was, we think, justified in the circumstances, in that the name imported a corporation. In United States Express Co. v. Redbury, 34 Ill. 459, the court's language is: "It seems to comport with reason that when an association of persons assume a name, which implies a corporate body, * * they should not be heard to deny that they are a corporation"; and this in our opinion is applicable to the facts before us.

On this theory, then, the return complained of, showing service on "John Doe, its agent, who refused to give his right name," should suffice, and we so hold.

An examination of the evidence and the rulings of the court reveals no error of sufficient importance to warrant a reversal, and for the reasons indicated the judgment is affirmed.

AFFIRMED.

148 - 24493

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ERA BOND, impleaded, etc.,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

214 I.A. 668

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The indictment charges that the defendant and one William Ravencamp, on November 1, 1915, in Cook County, did unlawfully, etc., conspire and agree, etc., together with one Lemuel Nutter, since deceased, to steal and carry away divers automobiles of the value of divers large sums of money, a further description of which was to the grand jurors unknown, the property of divers persons, likewise to said jurors unknown, with the usual conclusion as being against the peace, etc., of the people. To this indictment defendant pleaded not guilty, and being put upon his trial was found guilty by the jury and his punishment fixed by it at imprisonment in the penitentiary for the term of two years and a fine of one thousand dollars. The court, after overruling defendant's motion for a new trial, entered judgment upon the verdict that defendant be confined in the penitentiary at hard labor for the term of two years and that he pay a fine of $1,000, and if the fine be not paid that defendant work it out in the penitentiary at the rate of $1.50 a day.

Defendant argues for reversal erroneous rulings of the trial Judge in the admission and exclusion of evidence, rulings upon instructions, misconduct of the prosecuting attorney, denial of defendant's motion for a new trial, and in sentencing defendant to be imprisoned two years in the penitentiary and requiring him

in the event he did not pay the fine of $1,000 to work it out in the penitentiary at the rate of $1.50 a day.

The formation of the conspiracy and the guilt of defendant are sustained by a great preponderance of all the legitimate evidence found in the record, so that even were we to hold that much of the evidence objected to by defendant was wrongly admitted, still, had such evidence been excluded the verdict could not have been different. This is not a close case on the facts; therefore, unless we can say, with this condition in mind, that the evidence admitted over the objections of defendant was of such a hurtful character as to seriously affect the legal rights of defendant, no reason exists for sending defendant again before a jury where the result could not be changed if the cause was tried with the elimination of the evidence objected to. People v. Cleminson, 250 Ill. 135; People v. O'Brien, 277 ibid 3[illegible]5; People v. Halpin, 276 ibid 36[illegible]

The proofs demonstrate that the conspiracy formed for stealing automobiles in Chicago and sending them to defendant at the city of his residence, Minneapolis, was far reaching. Plans were laid with much artfulness to eliminate the license numbers from the stolen cars and also to remove identification marks upon other part of such cars. The manner in which the cars should be forwarded to defendant at Minneapolis was also agreed upon. In pursuance of this conspiracy it was proven beyond the peradventure of a doubt that many cars were stolen and were sent to and received by defendant and by him sold to innocent third parties, and that much money was realized from such sales, by which all the conspirators profited. When the conspiracy was formed defendant was seemingly so impressed with the ultimate success of it as a money making proposition that he voluntarily paid $5[illegible] for the first car, not in hand, but to be

stolen and delivered under the compact. One car in being driven to Minneapolis was stalled in the snow at Shullsburg, Wisconsin, and defendant was requested by telegraph to send $50 with which to pay expenses of shipping the car by railroad. This defendant did by a postoffice money order to Sutter, the deceased conspirator.

Defendant expressed himself to his co-conspirators as particularly desirous of procuring Buick and Hudson cars, which he said he could handle by the carload; that if he got them he would send them to North Dakota, Montana, South Dakota and other western states. This was said to Sutter, who replied that he could get all the cars needed; that he could steal all the cars he wanted; that it was such an easy thing to do that they could walk out in the street at any time and steal a car - all they needed was someone to receive them.

Defendant was convicted largely upon the testimony of two accomplices - Harris and Ehrenheim. At the instance of the State Ehrenheim testified that he had never done a dishonest act until he met defendant, that he was never indicted, charged with larceny or any other offense.

While this testimony might just as well have been omitted, in the condition of the other evidence it worked no harm to defendant. While the prosecuting attorney in his closing argument to the jury might have omitted with propriety his attack upon defendant as a man of wealth, accusing him of hiding behind a post when he was sitting in a seat provided for him in the courtroom, assuring the jury that the witness Harris would be prosecuted and sent to the penitentiary, and that while the State could not put one Lee upon the witness stand, defendant would have no trouble in getting him if he wished, reference to the number of counsel appearing for defendant, and opining that the yearly salary received by the prosecutor was probably only one-fiftieth of what defendant's

lawyers would receive in the case, still, in the light of all the incriminating evidence, we cannot say that these improper remarks prejudicially affected defendant's rights, or that if they had not been indulged in the verdict would have been different.

The indictment was returned February 14, 1917, the cause went to the jury on May 19, 1918, and they returned a verdict on that day. It is contended that the verdict of the jury in fixing defendant's punishment and that the instructions of the court to the jury regarding the forms of their verdict were erroneous. In entering the judgment upon the verdict the court ordered that if the fine of $1,000 was not paid it should be worked out in the penitentiary at the rate of $1.50 a day, and this is said to be in contravention of Sec. 2 of the Act of 1917, which provides that "No person shall by any court be committed to the penitentiary, reformatory or other state institution for the recovery of a fine or for costs." The judgment is therefore erroneous.

There was no error in the court's refusing to give instructions 15 and 18 requested by defendant, as there was no evidence to support them.

The record being without reversible error to the time of the rendition of the judgment, the error in the record resting in the judgment itself, it will be a sufficient corrective to have the Criminal Court enter a proper judgment upon the verdict of guilty of conspiracy charged in the indictment. People v. Beer, 264 Ill. 152; People v. Warfield, 172 Ill. App. 1.

The judgment of the Criminal Court is therefore reversed and the cause is remanded to that court with leave to the State's Attorney of Cook County to move for, and with directions to the Criminal Court to enter, a proper judgment upon

the verdict sentencing defendant Ira Bond to two years imprisonment in the penitentiary at Joliet and to pay a fine of one thousand dollars.

REVERSED AND REMANDED

WITH DIRECTIONS.

33 - 24700

(657a)

STEPHAN GORECKI et al.,
Appellants,

vs.

CHARLES HETHERINGTON et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

214 I.A. 668[4]

MR. JUSTICE BRIEN DELIVERED THE OPINION OF THE COURT.

Stephan Gorecki negotiated a loan of $8,000 and he and his wife executed a trust deed, which was a second mortgage upon certain real estate in Chicago, securing certain notes aggregating the amount of the loan. Gorecki and his wife filed the bill in the record to set aside the notes and the trust deeds securing the same on the allegation that they were procured by fraud and conspiracy between the defendants Hetherington, Emerman, Bomash and Bacon. The affair started in this wise. The Gorecki's had a daughter, Mania, who answered an advertisement of the defendant Hetherington which read: "Woman - A bright woman can make $5,000 per year; no fake; moving films. Address D 135 Tribune." Stephan Gorecki's daughter introduced him to the defendant Hetherington, the advertiser, who represented that he was engaged in the film business, and it was a great success; that he needed additional capital and that $5,000 would enable him to finish certain great films; that he needed the money for only three months, when it would be repaid, and that if Gorecki loaned him the money he would, after the money was paid, receive monthly profits of $500. When Gorecki told Hetherington that he had no money, that all he had was real estate which was mortgaged, Hetherington replied that he had personal friends who would advance the money on a second mortgage.

Hetherington then introduced Gorecki to the defendant Emerman. Hetherington and Emerman took Gorecki to the office of the defendants Romash and Bacon in Chicago. Romash dealt in real estate and mortgages and Bacon was his lawyer. Bacon examined the abstracts to the mortgaged property and drew the notes and trust deed, which were duly executed by Gorecki and his wife. Eight thousand dollars, the amount of the notes, was paid in a $5,000 check of Romash to Gorecki, which was endorsed by Gorecki and by him delivered to Hetherington. Romash with $1500 paid off a second mortgage upon one of the properties conveyed by the trust deed securing the $8,000 loan, the remaining money seeming to have been paid out for commissions and other charges in the transaction. At the time the $5,000 check was delivered by Gorecki to Hetherington they entered into an agreement in writing under seal, which recited that in consideration of $5,000 paid by Gorecki to Hetherington, the latter agreed to prepare, make or manufacture a certain film or films suitable for use on a moving picture machine; that Gorecki was to be the exclusive owner of the film or films prepared by Hetherington until such time as Gorecki was reimbursed by way of rentals or otherwise, from exhibitors or others, of such films, in the full sum of $5,000. Thereafter all moneys received for the use or rental of said films should be divided between Gorecki and Hetherington, Gorecki to receive 25% of such moneys and Hetherington the remaining 75% thereof. Hetherington further agreed to employ Gorecki's dauthter Hania and pay her a salary of $25 per week.

Hetherington made many representations regarding the profitableness of the film business, which statements were of such an alluring character as to entice Gorecki to go into the scheme, make the contract, and pay Hetherington the $5,000. Hetherington made at least two false representations; one, that he was backed by the McCormick estate and the other that he was

the father-in-law of Kimball, the piano man.

The defendants answered the bill denying all fraud charged. The cause was referred to a master, who took the proofs and reported his conclusions of fact and law to the court. Among the master's findings were the following: That a loan of $8,000 was procured upon Gorecki's property, of which Romash retained $1500 and used it in the payment of a second mortgage; that he retained a thousand dollars more for his share of the commission of $1500 for making the loan, paying to Emerman $500 as his share of such commission; that the remaining $5,000 was received by Hetherington from Gorecki; that Romash never heard of Hetherington or the Goreckis until the time he was told by Emerman that he wished a loan on the Gorecki property; that Romash hesitated about making the loan and did not make it for the amount of commission first offered by Emerman and only consented to make the loan by withholding $1500 to pay a second mortgage and a commission to himself of $1,000; that neither Romash nor Bacon saw the Goreckis or Hetherington until the day the money was paid out on the loan; that Romash and Bacon had no knowledge of the film or moving picture business; that the only matter for which Romash might be censured in connection with the transaction was the taking, in conjunction with Emerman, of the unconscionable commission of $1500 out of the loan; that Bacon had no interest in the matter whatsoever beyond his duty as attorney for Romash; that no representations knowingly false were made by either Romash or Bacon with reference to Hetherington upon which Gorecki relied or had the right to rely; that $7,000 of Romash's money went into the loan; that in making the loan to Gorecki $1500 was deducted by Romash, tainting the transaction with usury. After stating the account the master recommended that upon the payment by Gorecki to Romash of $4731.50 the remaining notes should be

cancelled and surrendered and the trust deed cancelled and released of record, etc.

The master further found that neither Somash nor Bacon ever saw or knew either of the three Gorecki's or Hetherington before the execution by Gorecki and his wife of the notes, trust deed, etc., in dispute, and that therefore they could not, and did not, make any false or fraudulent representations to them or either of them in any manner whatsoever in reference thereto; neither did Somash or Bacon combine or confederate in any way with any of the persons mentioned to wrong and injure the complainants or either of them; that the evidence fails to establish the conspiracy charged against the defendants. The findings of the master are abundantly supported by the proofs.

Objections filed to the master's report being overruled were re-filed as exceptions before the chancellor and again overruled, and a decree in accord with the master's report was entered. This decree finds that there is due from the Gorecki's to Somash the sum of $4928.60 on the $8,000 notes originally given; that there was due from Hetherington to complainant Stephan Gorecki $3734.46, and decrees that if complainants pay to Somash within ten days the said $4928.60, the unpaid notes should be surrendered and the trust deed, etc., released of record, and if said sum is not paid within said ten days, then the bill of complaint shall be dismissed as to the defendants Somash and Bacon for want of equity. And it was further decreed that Hetherington pay Stephan Gorecki said $3734.46 and that execution issue therefor, with certain other provisions regarding the payment of costs, etc.

That Hetherington was guilty of fraudulent representations regarding the film business in which he was engaged and of his own standing, the proofs fully demonstrate, also that

Gorecki was deceived by these representations and in faith of their verity entered into the contract with Hetherington and mortgaged his property to raise $5,000 which he paid to Hetherington. However, we agree with the master and the chancellor that the evidence utterly fails to show any conspiracy between Hetherington and the other defendants.

The proofs conclusively demonstrate that the defendants Bomash and Bacon are entirely innocent of any act which can be interpreted as in any way connecting them as parties to the misrepresentations made by Hetherington to Gorecki. While it is true that in a casual way the contract was spoken of in the presence of Bomash and Bacon, yet there is nothing in the record justifying a conclusion that either of them was aware of its exact contents. Furthermore, the contract itself bears no integral evidence of fraud. There is not one scintilla of evidence connecting either Bomash or Bacon with the film enterprises of Gorecki with Hetherington. The Goreckis were caught by the advertisement of Hetherington. They went into the transaction without any advice from either Bomash or Bacon. While Bomash retained an unconscionable commission, this is all the reflection which the record casts upon him. This wrong has been righted in the accounting and Gorecki made whole in relation thereto. Bacon was the attorney in the transaction, representing Bomash. He had no connection whatever with Hethrington or Emerman and his relation in the transaction was confined to that of attorney in the matter representing Bomash, and everything he appears to have done was, so far as the record discloses, ethical. He had no relationship with either Hetherington or Emerman, and Stephan Gorecki afterwards showed his confidence in Bacon's integrity by availing of his service in an endeavor to help him get back some of the money which Hetherington had filched from him by false representations.

The frauds of Hetherington, however glaring they may be, in no way impair the rights of Romash or reflect upon the integrity of Bacon or even of Amerman, for the reason that there is no proof of any of them being parties to Hetherington's frauds. In Bergeman v. Kickelberry, 242 Ill. 117, the court said:

> "It has been repeatedly laid down by this and other courts that fraud will not be presumed, but must be proved, like any other fact, by clear and convincing evidence. (Union Nat. Bank v. State Nat. Bank, 168 Ill. 256, and authorities cited.) Something more than mere suspicion is required to prove allegations of fraud. The evidence must be clear and cogent and must leave the mind well satisfied that the allegations are true. (Shinn v. Shinn, 91 Ill. 477.) If the motives and designs of the parties charged with fraud or collusion may be traced to an honest and legitimate source equally as to a corrupt one, the former explanation ought to be preferred. (McConnell v. Wilcox, 1 Scam. 344.)"

Complainants' proofs in this record standing alone would not justify a decree holding Romash and Bacon or either of them guilty of conspiring with Hetherington in deceiving Gorecki regarding the film contract, as charged in the bill, because complainants' evidence fails to show any act done or word spoken by either of the defendants Romash or Bacon in conjunction with Hetherington regarding any of the frauds or false statements emanating from him. The most that can be said in connection with the whole matter is that Romash and Bacon were present at the time Hetherington and Stephen Gorecki executed the film contract and the $5,000, the recited consideration for its making, was paid by Gorecki to Hetherington from a part of the proceeds of the money advanced on the notes for $8,000 and the trust deed securing them. In these circumstances the frauds of Hetherington are in no way imputable to the other defendants.

The decree of the Circuit court does justice between the parties, and there being no error either of law or procedure justifying either its reversal or varying, it is therefore affirmed.

AFFIRMED.

(Allowed)

289 - 24216

LAURA BUEHRLE, Executrix of the Last Will and Testament of Mathias A. Buehrle, Deceased,

Appellant,

vs.

WILLIAM J. F. BUEHRLE,

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

214 I.A. 668[5]

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

Mathias and William Buehrle were brothers engaged in the wholesale liquor business as equal partners. On March 13, 1909 they entered into what they called an "agreement" which, after reciting that they were equal partners in the wholesale liquor business referred to and that "the business in which they were engaged was of a precarious nature and one which, upon the death of either party would be materially injured and which if settled could not be settled to the advantage of the widow or the estate of the deceased;" and further that, "it is desirable that in such event the survivor should be enabled to conduct the business in his own right;" proceeded as follows:

> "Now, Therefore, this Indenture Witnesseth, that the said parties hereto have taken out a joint fifteen-year endowment policy, in the sum of five thousand ($5000.00) dollars, from the Illinois Life Insurance Company, conditioned for the payment of five thousand ($5000.00) Dollars upon the death of either one of the insured to the widow of such deceased person;
>
> Now, Therefore, the undersigned covenant and agree one with the other that each during the joint lives of said parties will pay one-half of the yearly premium of three hundred and seventy-five ($375.00) dollars upon said insurance policy, and will keep said insurance policy in full force.

[illegible]

[illegible]

[illegible]

And each of said parties, in consideration of the premises and the mutual covenants herein contained, further covenants and agrees that he will immediately make and execute his last Will and Testament, in and by which said last will and testament he will expressly give and bequeath unto the other of said parties hereto his entire interest in the wholesale liquor business of the parties hereto, conducted as aforesaid, and that he will not revoke the same during the lifetime of the other of said parties, and that he will not at any time heretofore make and execute any other or additional last will and testament unless such other will and testament shall contain a valid bequest to the other of the parties hereto of the entire interest of the testator in said business of the parties hereto. And they do hereby, in consideration of the premises, covenant and agree that the interest of either of said parties in the said firm of Math. Buehrle is and shall be that upon the death of one of said parties the entire business shall belong to the survivor of said parties, provided said insurance policy above mentioned is kept in full force and valid and payable to the widow of such deceased party."

This contract was executed in the presence of two subscribing witnesses. Under the same date and presumably following the execution of the foregoing contract, each of the brothers executed his will, pursuant to the contract. In and by his will, Mathias Buehrle appointed his wife, Laura, the executrix of his estate. By the second clause of his will he gave, bequeathed and devised unto his brother William, all his interest in the wholesale liquor business in question and by the third clause of his will he gave, bequeathed and devised all the remainder of his estate to his wife Laura. Following these clauses, his will proceeded as follows:

"The above bequest to William J. F. Buehrle is conditioned upon there being in full force and effect at the time of my death a life insurance policy upon the joint lives of myself and William J. F. Buehrle, payable in the event of my death, in the sum of five thousand ($5000.00) dollars, to my wife, Laura Buehrle; and in case of the death of William J.F. Buehrle, payable to his wife, Emilie Buehrle; and if said insurance policy should not then be in force, then the above bequest to William J. F. Buehrle of said wholesale liquor business shall be void."

Had each of said parties, in consideration of the premises and the mutual covenants herein contained, further severally and agreed that he will immediately make and execute his last will and testament, in and by which said last will and testament he will respectively give and bequeath unto the widow of said parties herein his entire interest in the community figure mentioned of the parties herein, mentioned as aforesaid, and that he will not revoke the same during the lifetime of the widow of said parties, and that he will not in any form encumbrance same and execute any other or additional last will and testament unless such other will and testament shall contain a with bequest to the widow of the particular herein of the entire interest of the testator in said community of the parties herein. And they do hereby, in consideration of the premises, severally and agree that the bequest of either of said parties to the other from of death. Therefore is not made in that upon the death of any of said parties the entire community shall inure to the survivor of said parties, provided that nothing herein contained shall be deemed to be full there and valid and binding in the nature of mutual bequest.

This contract was entered in the presence of two witnesses, Upon the that and the mutually fulfilling the conditions of the foregoing instrument, each of the testators executed his will, pursuant to the contract, leaving [illegible] to the survivor [illegible] his entire interest. Shortly thereafter, the husband of his wife, Lucas, the executor of his estate, by the second clause of his will he gave, bequeathed and devised unto his brother Gilbert, all his interest in the community figure existing in partition and by the joint decree of his will he gave, bequeathed and devised the remainder of his estate to his wife Lucas. Explaining these clauses, he will presented as follows:

"The sworn testimony of witness F. K. Dunlap is unmistakenly upon their being in full force and effect at the time of my death a life insurance policy upon the joint lives of myself and wife in F. K. Dunlap, payable in the event of my death, in the sum of five thousand ($5000.00) dollars, to my wife, Lucas Dunlap; and the sum of one dollar of Gilbert K. Dunlap, payable to his wife, Gilbe Dunlap; and if such insurance policy should not be in force, then the above be-quest to Gilbert K. Dunlap of said community figure herein shall be void."

There is some evidence in the record tending to show that the partners' capital accounts totaled about $58,000 in 1911 and about $97,000 in 1916. Mathias Buehrle died January 30, 1916, leaving his wife Laura, the complainant in this case, surviving him. At the time of his death, the policy provided for in the contract executed by the two brothers, and referred to by Mathias in his will, as quoted above, was in full force and effect and the complainant received the five thousand dollars provided for in said policy, as the beneficiary. She qualified as the executrix of her husband's estate and collected one thousand dollars under another insurance policy which he carried, payable to his estate.

She used a portion of the proceeds of the five thousand dollar insurance policy to pay off a mortgage on some property which she and her husband held jointly, and subsequently she sought to renounce such rights as she had under her husband's will and elect to take such share of the estate as the law gave her. Thereupon, she charged herself, as executrix, with the five thousand dollars collected under the joint insurance policy, and now holds such portion of the proceeds of the policy as she has not used, awaiting the determination of the court as to whether the proceeds of this policy properly constitute a part of her husband's estate. The surviving brother William, the defendant in this case, converted the entire partnership assets to his own use and refused to settle the partnership or make any accounting to the complainant, as executrix of the deceased partner. The complainant filed this bill praying for the appointment of a receiver of the partnership, that the partnership might be settled and that an accounting might be had between the parties.

It appears that during the continuance of the partnership, the defendant had drawn out of the business $1071.22 more than his brother Mathias. The complainant has prosecuted this appeal, from a decree entered by the chancellor wherein it was ordered that the complainant recover $535.61 from the defendant on an accounting of the amount drawn out by him in excess of the amount drawn out by the deceased brother before the latter's death, and wherein the chancellor decreed that, except in the matter of the said accounting, there was no equity in the complainant's bill, which bill was therefore dismissed for want of equity in every particular other than said accounting.

In our opinion the rights of the defendant in this case to the interest of his deceased brother in the partnership in question, is derived solely, through his brother's will and not through the contract which he and his brother entered into. The issues in this case rest upon the proper construction of thelanguage appearing in the contract referred to. By the terms of that contract the brothers did not convey any interest in the partnership to each other but, after, in effect, reciting that the wholesale liquor business in which they were engaged, as equal partners, was such as would be materially injured if either of them were to die intestate, they proceeded to agree that each would immediately make, and execute a will by which each would bequeath to the other his entire interest in the partnership business, and further, they mutually agreed that they would not revoke such wills nor make any additional will unless it contained a valid bequest, to the other of the parties, of the entire interest of the testator in said liquor business and they further mutually

agreed that during their joint lives they would maintain a five thousand dollar life insurance policy, payable to the widow of the one who died first, and that each of them would pay one-half of the yearly premium of said policy. It is clear that these provisions make no conveyance of any partnership interest by either of the partners to the other but it is contended by the defendant that the last sentence of the contract does accomplish such a conveyance, under which, there immediately vested in him, upon execution of the contract, a contingent interest in the whole of the business; his right to the possession of the whole being postponed until his brother's death. This contention is based on the word "is" used to express the interest of each of the parties in the partnership business as expressed by the contract. In our opinion the last sentence of the contract amounts to a statement to the effect that by the contract the parties seek to make their respective interests those of equal partners coupled with the right each will have under the will of the other, to be executed pursuant to the terms of the contract on condition that the insurance policy, provided for by the contract, be kept in full force and effect, for by that sentence they say that the interest of each of them "is * * * that upon the death of one of said parties the entire business shall belong to the survivor of said parties, provided said insurance policy above mentioned is kept in full force * * *." But by the contract, itself, the parties did not convey, to each other, any interest in the partnership business. That such was not their intention seems clear from the fact, that after the execution of the contract they executed their respective wills in which they severally bequeathed to each other their interest in the liquor business and made that bequest to depend upon there being in full force and effect,

at the time of their death, the insurance policy provided for under their contract, and provided that such bequest should be void in case the policy should not then be in force. If the execution of the contract had had the effect contended forby the defendant, neither of the parties, after executing the contract, would have had remaining such an interest in the partnership as he attempts to dispose of by the terms of the will.

Upon the death of Mathias, the insurance policy provided for under the contract, was in full force and effect. This fulfilled the condition of the bequest of his interest in the partnership business, made by Mathias in his will and therefore that bequest became operative and the interest of Mathias in the partnership passed to William at that time and under and by virtue of the terms of the will but the law gave the complainant, the widow of Mathias, the privilege of renouncing her rights under the will and sharing in her husband's estate as the statutes provide and we are of the opinion that, her legal rights in this regard were in no way affected by the contract which her husband and his brother had entered into on the subject of the insurance policy nor were they affected by her collection of the proceeds of that policy. We are further of the opinion that the money she has received under the policy is her individual property and never belonged to the estate, and that the interest of Mathias in the wholesale liquor business is the property of the estate and should be treated as such and disposed of as the statutes provide, in case of renunciation by the widow and her election to take under the law.

For the reasons stated the decree of the Circuit Court is reversed and the cause is remanded to that court with directions to refer said cause for the taking of an accounting as

prayed for.

REVERSED AND REMANDED
WITH DIRECTIONS.

92 - 24393.

5

ANTON CERMAK, Bailiff of Municipal Court of Chicago, for use of George K. Spoor,

Plaintiff in Error,

vs.

THE RUDOLPH WURLITZER COMPANY, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendants Below,

THE RUDOLPH WURLITZER COMPANY, a corporation,

Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 669

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Anton J. Cermak, brought this action for the use of George K. Spoor, against the defendants, seeking to recover on a replevin bond. The trial court found the issues against the plaintiff and entered judgment in favor of the defendants for costs, to reverse which plaintiff has sued out this writ of error.

George K. Spoor leased certain premises to Catalano and Bambara for restaurant purposes. The tenants were in arrears for rent and Spoor recovered a judgment against them in distress proceedings under which he took possession of all their equipment and personal property located on the premises. After Spoor started his proceedings against his tenants but before he recovered judgment in the distress proceedings, the defendant Wurlitzer Company replevied from him a piano which they

had previously sold to said tenants and which Spoor had seized together with the other property of the tenants and in that connection the two defendants in this suit executed the replevin bond on which the present action is based. When the replevin action was reached for trial in due course, it was dismissed for want of prosecution, whereupon the present action was instituted on the bond.

It further appears from the evidence that the Wurlitzer Company instituted the replevin proceedings referred to and, upon giving their bond with defendant United States Fidelity and Guaranty Company as surety, a copy of which bond was introduced in evidence, the writ was issued and under it they secured possession of the piano, after which the replevin suit was dismissed for want of prosecution and a writ of retorno habendo was awarded, which writ was returned by the bailiff of the Municipal Court, no part satisfied, and it further appears that the value of the piano was $900. This made out a prima facie case entitling the plaintiff to recover. Kellogg v. Boyden, 126 Ill. 378; Hoffman for use of v. Paradis, Ill. App. Court, 1st District #18693, opinion filed May 21, 1919.

The defendants filed an affidavit of merits denying certain allegations in the statement of claim which had been filed by the plaintiff, alleging the invalidity of the distress proceedings and further setting up a chattel mortgage covering the piano in question under and by virtue of which it was claimed that the piano was the property of the defendant Wurlitzer Company.

After the plaintiff had submitted sufficient proof to make out his prima facie case, as above set forth, he

proceeded to submit evidence tending to support the validity of his distress proceedings, a matter which was wholly immaterial in this action on the replevin bond.

The defendant in error has filed no brief in this court. It appears from the record that the trial court was of the opinion that the distress proceedings were faulty and for that reason he found the issues for the defendants, without any evidence being introduced by them in support of their title to the piano, as set forth in their affidavit of merits. This was error. The only issue before the court was whether the Wurlitzer Company wasthe owner of the piano. By permitting the replevin suit to be dismissed for want of prosecution the Wurlitzer Company lost all right to contest the plaintiff's claim to the piano except that saved to it by the statute, which was to plead and prove that the merits of the case had not been determined in the trial of the action in which the bond was given, and its title to the property, in mitigation of damages. In no other respect could the defendant contest the plaintiff's title. It could not attack the right or title of the bailiff or of Spoor. Stevison, et al v. Earnest, 80 Ill 513; Manchetti v. Gardner, et al, 138 Ill. 571; Keith v. Edwards, 42 Ill. App. 280; Farson v. Gilbert, 85 Ill. App. 364; Fabian v. Tracker, 117 Ill. App. 176; Hook v. Hagerstadt, 124 Ill. App. 140; Bierum, for use of, v. Columbia Typewriter Company, 179 Ill. App. 69. The affirmative of the issue as to defendants' right to the property involved, was upon the defendant Wurlitzer Company. Stevison v. Earnest, supra; Fabian v. Tracker, supra. Even if the Wurlitzer Company had established its right to the piano under the chattel mortgage,

pleaded in the affidavit of merits, the plaintiff in this action on the bond would have been entitled to a judgment for nominal damages and costs. The dismissal of the replevin suit and failure to return the property in accordance with the judgment of the court in said suit, constituted a breach of the replevin bond for which the obligee in the bond would be entitled to recover nominal damages. Schweer v. Schwabacher, 17 Ill. App. 78.

The plaintiff misled the trial court by submitting testimony on an issue that was not in the case. It was not incumbent upon him to support his title. Having made out his prima facie case, the defendant should have been required to make out its title under its affidavit of merits by a preponderance of the evidence.

For the reasons stated the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

119 - 24425

FORT DEARBORN FIREPROOF STORAGE CO., a corporation, Appellee, vs. UNITED CIGAR STORES COMPANY OF AMERICA, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT, OF CHICAGO.

214 I.A. 669

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The Fort Dearborn Fireproof Storage Company brought this action against the United Cigar Stores Company to recover damages alleged to have been caused to one of its trucks as a result of the alleged negligence of one of the employees of the defendant, in driving one of its trucks and colliding with the plaintiff's truck.

The testimony of the driver and helper on the plaintiff's truck was to the effect that both sides of La Salle street, near Polk street, in the City of Chicago, where the accident happened, were lined with horses and wagons loading and unloading at the freight houses which are located on both sides of La Salle street at that point; that the plaintiff's truck was standing still facing north, on the east side of the street, close to the horses and wagons and other vehicles standing there; that there was a space of about 15 feet between the outer side of the plaintiff's truck and the horses and wagons and other vehicles standing on the west side of the street; that there was a small pile of snow and ice about two feet outside of the vehicles lined up on the west

side of the street and a little to the north of the plaintiff's truck; that the defendant's truck came along La Salle street, from the north, and as it proceeded to pass the plaintiff's truck to the west the chauffeur drove over the pile of snow and ice referred to; that the front wheel passed over the snow and ice all right but the rear of the truck skidded over to the left and bumped into the plaintiff's truck on the left side of the front, scraping along its entire length, and came to a stop 15 or 20 feet beyond. The plaintiff's driver testified that he got off his truck and looked it over but that he did not go back to the defendant's truck. The helper testified that he had just come out of one of the freight houses when he saw the defendant's truck approaching and he had reached the front end of his truck as the defendant's truck was passing and after the latter had come to a stop he went back and got the number of the defendant's truck, but that there was no conversation between him and the defendant's driver. It is claimed that the radiator of the plaintiff's truck was somewhat damaged, the pump shaft was bent and the entire left side panel of the truck was scratched and otherwise damaged.

The only witnesses for the defendant were the driver of its truck and one of their repair men. The latter testified that the truck in question had not been damaged in any way and that there had been no occasion, at or about the time of the alleged accident, to make any repairs upon it. The driver of the defendant's truck testified that on the day on which the accident is alleged to have happened, he drove the truck in question, but that at no time on that day did he have any accident or collision with any truck and that when he drove it in that night it did not have a scratch on it and it was in the same condition that it was when he took it out. He testified that he might have driven on La Salle street that day

but he don't remember that he was in the vicinity where the plaintiff's witnesses testified the accident took place; that according to the loads and pick-ups he had that day, he was not around that freight depot. The collision was alleged to have occurred February 6, 1918. The trial of this case occurred two months later and the witness testified that his attention was called to the date in question about a week before the trial. It is apparent from other evidence that the defendant knew of the fact that the collission was alleged to have occurred about a week after February 6th.

The defendant contends that the judgment of the trial court for the plaintiff for the sum of $200, the cost of repairs to the plaintiff's truck, should be reversed, as it is against the manifest weight of the evidence in that the evidence fails to show, by a proper preponderance, first, that the accident occurred at all and second, that if it did occur it was due to any negligence on the part of the defendant. The witnesses were few and the evidence flatly contradictory. We have closely examined the evidence as contained in the record and we cannot say that the finding of the trial court is manifestly against it. As to the negligence alleged, it appears from the testimony of the plaintiff's witnesses that there was an ample amount of room between the pile of snow and ice referred to and the plaintiff's truck, to have enabled the defendant's driver to pass without difficulty, and if the testimony of the plaintiff's witnesses is true, the defendant's driver was negligent in so driving his truck over the pile of snow and ice as to cause it to skid over to the left and come in contact with the plaintiff's truck. We find nothing in the record which would lead us to the conclusion that the trial judge, who heard the evidence without a

jury, was not warranted in taking the testimony of the plaintiff's witnesses as true.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

132 - 24439

ALFREDO ALVAREZ, doing business under the name of Alfredo Alvarez and Co.,

Defendant in Error,

vs.

AMELIA FERNANDEZ, Surviving partner of the firm of the Fernandez Havana Co.,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 669[3]

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of the first class in the Municipal Court of Chicago, in which the plaintiff, Alvarez, sought to recover a balance alleged to be due him from the defendant, for tobacco sold and delivered by the plaintiff to the partnership of which the defendant is alleged to be the surviving partner. By this writ of error the defendant seeks to reverse a judgment in the sum of $1484.69, rendered against her in the trial court after a hearing of the issues by the court, a jury having been waived.

On motion of the defendant in error, the bill of exceptions has been stricken from the record in this court and therefore there is nothing but the common law record before us, and of the points made by the plaintiff in error the only one which we can consider, is her contention that the statement of claim is insufficient and fatally defective in that it fails to aver that the plaintiff was a licensed and qualified dealer in leaf tobacco and that the defendant was a

licensed dealer in tobacco and in the manufacture of cigars, as required by the federal statutes. There are several reasons why this contention cannot be urged successfully. It will be sufficient to state that the question raised was a matter of defense and was such a matter as will be presumed unless the contrary is especially relied on as a defense. Woodley v. Zeman, 173 Ill. App. 369 and cases there cited. It was not so relied upon by the defendant in this case. Her affidavit of merits made no reference to such a contention and did nothing beyond making a denial of each and every allegation in the statement of claim. That being the case she cannot urge the matter now. On the record before us the statement of claim set forth a good cause of action.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Libraries should be between 100 to the manufacturers of objects, as required by the Federal statutes. Their are various from some city table quotations cannot be argued responsibility. It will be questioned as given that the questions indeed one a majority of members and each a limited as will be presented under the training is especially points on to a nations. Similar to Chemo. 100 111. 100. 800 not some their stand. It is yet no points lower by the involved in this read. The efficiently of media cause on reference is such a machine time and and making purpose making a model of such each every allegations in the statement of claims. That being the same the second which the making was. The the header before the statement of claim and first is part number of action.

For the reason stated the judgment of the municipal court is affirmed.

AFFIRMED.

96 - 24399

CONRAD A. MANSON,

Defendant in Error,

vs.

IRVING I. STERN, JOHN URBAN and JACOB URBAN, also known as JAKUB URBAN,

Plaintiffs in Error.

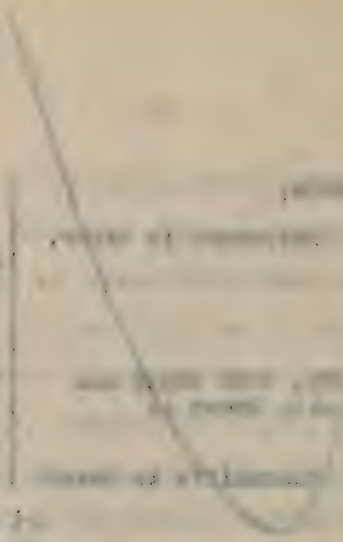
ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 669[4]

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendants to recover the balance due on three promissory notes of $60 each, --- $142.12, and had judgment in his favor for the amount of his claim. To the statement of claim defendants filed an affidavit of merits, which on motion was stricken, and by leave of court defendants filed an amended affidavit of merits, which was likewise stricken. Thereupon defendants elected to stand by their amended affidavit of merits and judgment for plaintiff was entered on his statement of claim, to reverse which the defendants have sued out this writ of error. The only question involved therefore is whether the amended affidavit of merits set up a legal defense.

The three notes on which plaintiff's claim was based were each for the sum of $60, dated July 1, 1913, and due January 1st, April 1st, and July 1st, 1914, respectively, payable to the order of plaintiff and signed by the defendants. The notes were numbered 2, 3, and 4. $30 had been paid on note No. 2, and suit was brought to recover the balance on that note and notes 3 and 4.



The amended affidavit of merits averred that the notes in suit were of a series of eleven notes, given by the defendants to the plaintiff in part payment for a plumbing shop; that after the purchase of the plumbing shop and the execution and delivery of the eleven notes, viz; April 18, 1914, the defendants sold the shop to Louis Konrad and P. J. Bohan; that at that time there was a mutual verbal contract entered into between the plaintiff, defendants, and Konrad and Bohan, whereby the defendants sold the shop to Konrad and Bohan, who as a part of the consideration agreed to pay the balance due on the series of notes to plaintiff; that plaintiff agreed to accept this payment and released the defendants on the notes, and that the defendants gave credit to Konrad and Bohan for the balance due on the notes.

The defendants contend that this transaction constituted a novation, and was therefore a complete defense to the suit. Plaintiff's position is, as we understand it, that if the agreement contended for by the defendants had been made, "the notes in question would have either been delivered up and cancelled * * * or some notation would have been written on the notes. * * * A written release or instrument must be executed and delivered to the plaintiffs in error by the defendant in error to relieve or release the plaintiffs in error from payment of these notes." We know of no such requirement of the law. Plaintiff's argument, in its last analysis, means that the agreement as set up in the amended affidavit of merits, was not made. This of course is a matter of proof. We think the amended affidavit of merits contained all the requisites of a valid novation. Hayward v. Burke, 151 Ill. 121.

The Canadian Authorities at Ottawa wondered that
the nation in which they is problem of eleven years, given
by the Government to the plaintiff is part payment for a
pleasing event that other one overhead of the Canadian when
was the revelation was already at the eleven years, still
again so, life, the government was the long to Louis Stanton
and C. F. Bennet that the time short was a natural verbal
contract existed life between the plaintiff, defendants,
and Stanton and Bennet, namely the defendants said the long
in Stanton and Bennet, who as a part of the consideration
agreed to pay the balance due on the notes at maturity so
plaintiff; that plaintiff agreed to carry this payment
and release the defendants in the notes, and that the re-
leased plaintiff still is liable and bound for the balance
due on the notes.

The defendants contend that such transaction were
without a consideration, and are therefore a nullity under
the law said. Plaintiff's position is, as we understand it,
that if the agreement mentioned the 3d the attorneys that been
made, "the period in question which date notes been delivered
of not exceed" * * * we have certain notes been
matured on the notes, * * * which plaintiff's agreement to
meet in question was binding on the plaintiff's in order
to the agreement in order to release or release the obligor
little to serve this purpose of their notes." In fact of no
such requirement of the law. Plaintiff's argument, in his
last analysis, seems that the attorneys in act up to the
command authority of Smith, and not such. That if notes
is a matter of proof. We think the command authority of
matter mentioned all the requisites of a valid novation.
Bennet to Stanton 3d Cir. 3d.

Plaintiff also contends that the defendants "have not filed a proper transcript of record in this court and the writ of error should therefore be dismissed at the costs of plaintiffs in error," citing Ford v. Ford, No. 23786, decided in another division of this court. No defect in the record is pointed out. We have examined the record, and it is a complete transcript, except the original bill of exceptions, by stipulation of the parties, is incorporated in the record.

We think the amended affidavit of merits on its face stated a legal defense and the case should have been tried.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

117 - 24423

ALLEN KRACK, by Nicholas Krack, his next friend, Defendant in Error, vs. WILLIAM T. MAYPOLE, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

214 I.A. 670

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, by his next friend, brought suit against the defendant to recover damages by reason of being bitten by the defendant's dog. There was a verdict in plaintiff's favor for $1000 from which he remitted the sum of $500 and judgment was entered for the balance, to reverse which defendant prosecutes this writ of error.

The amended statement of claim on which the case was tried alleged that the defendant was the owner of a bull dog and carelessly and negligently permitted it to run loose in a public thoroughfare without an attendant or muzzle, while it was afflicted with the disease commonly called rabies; that the bull dog was a violent and vicious animal; that the defendant prior to and at the time the dog bit plaintiff knew that the dog was afflicted with rabies and was violent and vicious; and that through such carelessness and negligence the dog bit the plaintiff.

The affidavit of merits, so far as material, denied that the defendant owned the dog; that the dog was afflicted

117 - 0680

AMOS CLAIR, by Elizabeth Crane,
his next friend,

Defendant in error,

vs.

WILLIAM T. BAYNES,

Plaintiff in error.

ERROR TO
CONSTITUTIONAL COURT
OF COLORADO.

211 U.S. 570

Mr. Justice O'Brien delivered the opinion of the court.

Clairol, by his next friend, brought suit against the defendant to recover damages by reason of being injured by the defendant's dog. There was a verdict in plaintiff's favor for $1500 from which he received the sum of $100 and judgment was entered for the balance, he returning with notwithstanding his writ of error.

The recorded statement of claim in which the case was tried alleged that the defendant has the owner of a bull dog and wrongfully and negligently permitted it to run loose in a public thoroughfare without an attendant or muzzle, while it was afflicted with the disease commonly called rabies; that the bull dog was a violent and vicious animal; that the defendant policed to and at the time the dog did plaintiff bump that the dog was afflicted with rabies and was violent and vicious; and that through such negligence and negligence the dog did the plaintiff.

The affidavit of merits, so far as material, stated that the defendant owned the dog; that the dog was afflicted

with rabies; that the dog was vicious or diseased, or that the defendant knew that the dog was vicious or diseased.

The record discloses that the defendant lived in Chicago; that he had a summer home at Fox Lake, Illinois; that about eight years prior to the time in question, he purchased at a bankrupt sale a grocery store at Fox Lake; that the store was managed by defendant's son who was about thirty-eight years old; that the defendant during the summer months lived in a cottage about two miles from the store and was around the store frequently; that about a year prior to the time plaintiff was injured the bull dog was sent to Fox Lake from Chicago to the defendant's son, who was managing the store and who was living in a flat immediately above the store; that plaintiff, a child about 18 months old, lived with his parents in a flat above the store and adjacent to the one occupied by the defendant's son. There also lived with plaintiff's parents in the same flat, plaintiff's sister, a girl about four years old. On May 6, 1914, a little before noon, plaintiff was taken to his mother; the child's lip was bruised and cut and was bleeding, and he was badly scratched near the base of the temple, and while no one saw the dog attack him, it seems to be conceded that the injuries were caused by the dog. Physicians were consulted and the child was brought to the Pasteur Institute in Chicago and received treatment. The child was not sick at any time and soon fully recovered. The mother testified that the only remaining evidence of the injury was just a little white mark on the child's forehead and a little gash on his lip, which was scarcely perceptible. And at the trial counsel for plaintiff expressly stated that they made no claim for permanent injuries. The dog was shot shortly after the injury, and its

with malice; that the dog was vicious or dangerous, or that the defendant knew that the dog was vicious or dangerous.

The records disclosed that the defendant lives in Chicago; that he has a summer home on the Lake, Illinois; that about eight years prior to the time of injuries, he purchased at a department store a grocery store at 2700 Lake; that the store was managed by defendant's son, who was about thirty-eight years old; that the defendant during the summer months lived in a cottage about two miles from the store; and was around the store frequently; that about a year prior to the time plaintiff was injured the bull dog was sent to the lake from Chicago to the defendant's son, who was managing the store and who was living in a flat immediately above the store; that plaintiff, a child about 12 months old, lived with his parents in a flat above the store and adjacent to the one occupied by the defendant's son. There also lived with plaintiff's parents in the same flat, plaintiff's sister, a girl about four years old. On July 6, 1914, a little before noon, plaintiff was taken to his father; the child's lip was bruised and cut and was bleeding, and he was badly scratched near the nose of the temple, and while he saw the dog attack him, it seems to be conceded that the injuries were caused by the dog. Physicians were summoned and the child was brought to the Passavant Institute in Chicago and received treatment. The child was not sick at any time and was fully recovered. The mother testified that the only remaining evidence of the injury was just a little white mark on the child's forehead and a little pack on his lip, which was scarcely perceptible. And at the trial counsel for plaintiff unqualifiedly stated that they made no claim for permanent injuries. The dog was shot shortly after the injury, and its

head was brought by the defendant to Chicago and taken to the health department, where the brain was examined, the examination indicating that the dog had rabies. It further appears from the evidence that defendant, upon being notified of the injury to the child, expressed his sympathy to the child's mother, consulted with physicians and told plaintiff's mother that he would stand all expense for medical treatment.

A number of questions are argued, but in the view we take of the case, it will be unnecessary to consider any of them, except whether the evidence sustained the averment that the dog was vicious and afflicted with rabies, and that the defendant knew this.

Plaintiff's mother testified that she lived in the flat above the store and adjacent to the one occupied by defendant's son, from October, 1913, to June, 1914; that the dog was about the premises every day; that the dog was kept in the flat occupied by defendant's son who was managing the store, and that it ran loose and had the privileges of the store and porches; that everybody knew the dog; that sometimes it would lie on her back porch in the sun; that she saw the dog every day, but never saw it bite anyone. Peter Langbien testified that he lived in Fox Lake and had known the defendant five or six years; that he saw two bull dogs around there; that he heard the dog bark; that the dog "barked at him as he went by, so did the other dog;" that the dog did not run towards the witness; that the dog would "stand there and as a person would go by he would bark, growl, but I cannot say he ever made an attempt to bite." Joe Custer, called by plaintiff, testified that he had lived in Fox Lake

Dual was brought by the entrance of Gideon and Luke to the small department, where the birth was imminent. The assistants instructing when the dog was born which. In further opposing from the reference that determined, upon being-medicine of the injury to the child, acquainted his sympathy in the doctor's action, something with physicians and with physicians- ally another than he would never all expense for medical treatment.

A month it questions are argued, but in the case we have of the man, it will be unnecessary to consider any of them, except perhaps the evidence establishing the attempts that has dog was victim and affirmed with refuse, and that he intended harm thus.

Shortly's author statistics that she lived in the flat above the store but adjacent to the one occupied by Intendant's son, Ivan Dyadkov, 1812, in June, 1924; that the day was figure the grandson stated; that the dog was kept in the flat occupied by Intendant's son who was making the shoe store, and that it was large and had the privileges of the store and yards; that everybody knew the dog; that nobodies is would like to bar bone pieces in the yard; that she saw the dog every day, but never saw it bite anyone. Petty Langdon testified that he lived in the house and had lived the gardener life of six years; that he saw the bull dog around there; that he heard the dog bark; that the dog "barked as one he was by, as did the other dogs" that the dog did not run towards the witness; that the dog would "stand there and if a person would go by he would bark growl, but I heard her he never made no attempt to bite." The Doctor, aging by plaintiff, testified that he was called to the house

about nine years; that he had seen the dog around the store; that he walked by the store every day; that the dog did not bark at anybody; that he growled at the witness once as he went by; that he never heard him growl at anyone else; that he never told the defendant that the dog growled at him; that there were two dogs around there and he could not swear which one of them it was that growled at him; that the defendant's dog was "very ugly;" that he never told the defendant anything about the dog. C. M. Spring, for the plaintiff, testified that he lived at Fox Lake and Libertyville; that he had no business; that he lived in Fox Lake in 1914; that he knew the defendant and saw him nearly every day, as he frequently visited the store; that he saw the bull dog around there every day; that when the witness passed the store one evening "he scared me badly; he jumped on me and grabbed at me." He further testified, "shortly after that I saw the defendant, Mr. Maypole, and told him that I thought he ought to do something to that dog for he had me 'buncoed.' He said he would not bite anybody;" that after this the witness was in Fox Lake until December of that year; that he watched the dog carefully and never saw him run after anyone else. On cross-examination, the witness testified: "It was in the early evening that the dog jumped at me. I was in the street and na one was with me. I was probably going to the Maypole store. I do not remember mentioning the fact to any one in the store that evening. I cannot remember how long a time elapsed between the time the dog jumped at me and the time I told Mr. Maypole about it, and I cannot remember who was present when I spoke to him about it, but I spoke to him in his store and I think his son, Harry, was there."

The defendant and his son Harry both denied that the witness had ever spoken to them about his experience with the

about nine years; that he had seen the dog around the store; that he walked by the place every day; that the dog did not bark at anybody; that he growled at the strangers more as he went by; that he never heard him growl at anyone then; that however this the testimony that the dog growled at them; that there are two dogs around there and he really was sure which one of them it was that growled; that the testimony said the dog "very mildly" that he never told the testimony anything about the dog. S. E. Darling, for the plaintiff, testified that he lived at Tea Lake and independently; that he had no business; that he lived in Tea Lake in 1924; that he knew the defendant and saw him nearly every day, he he frequently visited the store; that he saw the bull dog around there every day; that were the witness passed the store the growling "he snapped at nobody; he jumped at us and growled at us." On further testified, "nearly every time I saw the defendant, Mr. Dapphis, and told him that I thought he ought to do something to that dog for he had at 'innocent.' He said he would not kill anybody." That after this the witness was in Tea Lake until December of that year; that he watched the dog generally and never saw him after strangers also. On cross-examination, the witness testified: "It was in the early evening that the dog jumped at us. I was in the street and he was with us. I was probably going to the Dapphis store. I do not remember mentioning the fact to any one in the store that evening. I cannot remember the last time I told Mr. Dapphis about it, and I cannot remember the time I spoke to the defendant about it, but I spoke to him in his store and I think for sure, Henry, was there."

The defendant and his wife Henry testified that the witness had never spoken to them about his experience with the

dog. There is not a particle of evidence that anyone knew prior to the examination of the dog's brain, after the child was injured, that the dog was afflicted with or exhibited any signs of rabies. Other witnesses testified that the dog was of a gentle disposition and not at all vicious. We think the evidence falls far short of establishing the fact that the dog was of a vicious disposition and that such viciousness was known to the defendant. The most that could be said of the witness Langbien's testimony is that the dog barked at him as he went by the store, and the defendant was not informed of this, so far as the record shows. The witness Custer testified that the dog growled at him as he went past, but that he did not tell the defendant of the occurrence. The witness Spring testified that the dog once jumped on him and grabbed at him and that he afterwards told the defendant that the dog had him "buncoed" and that something ought to be done. He does not say that he told the defendant that the dog jumped on him and grabbed at him. The question that the dog was afflicted with rabies should not have been brought into the case, as there is not a particle of evidence that anyone ever knew of this until after the dog was killed. The evidence was not sufficient to sustain the averments of plaintiff's statement of claim. Field v. Morrison, 142 Ill. App. 454; Domm v. Hollenbeck, 259 Ill. 382; Swanson v. Miller, 142 Ill. App. 208; Fritsche v. Clemow, 109 Ill. App. 355. And the court should have directed a verdict for the defendant. Dogs are presumed to be tame, docile and harmless, both as to persons and property, and to hold the owner liable for damages occasioned by them, it is incumbent on the plaintiff to prove that the dog was vicious and that this was known to the owner. This has always been the law

dog. There is not a particle of evidence that appears from
prior to the commencement of the dog's bark, after the
shell was delivered, that the dog was afflicted with or ex-
hibited symptoms of rabies. Every witnesses testified
that the dog was of a gentle disposition and not in all
respects. He ate the waitress fully for about of strab-
bishing the fact that the dog was of a vicious disposition and
that such disposition was known to the defendant. The most
that could be said of the witness Langhorst's testimony is that
the dog barked at him as he went by the store, but the defend-
ant was not informed of this, so far as the record shows.
The witness Dexter testified that the dog growled at him as
he went past, but that he did not tell the defendant of the
occurrence. The witness Spring testified that the dog was
jagged as the dog growled at him and that he afterwards told
the defendant that the dog had bit "jagged" and that some-
thing ought to be done. He does not say that he told the
defendant that the dog jumped on him and growled at him.
The question that the dog was afflicted with rabies should
not have been brought into the case, as there is not a par-
ticle of evidence that anyone ever spoke of this until after
the dog was killed. The evidence was not sufficient to sustain
the averments of plaintiff's statement of claim. Pfeil v.
Kreiser, 148 Ill. App. 234; Swan v. Lallemand, 99 Ill. App.
Swanson v. Miller, 141 Ill. App. 409; Pickens v. Tanner, 108
Ill. App. 223. And the court should have directed a verdict
for the defendant. Dogs are treated in the same, legally and
business, with as to persons and property, and to hold the
owner liable for damages occasioned by them, it is necessary
on the plaintiff to prove that the dog was vicious and that
this was known to the owner. This has always been the law

in this state, and is clearly announced in the Domm case, where the court said: "The natural presumption from the habits of dogs is that they are tame, docile and harmless, both as to persons and property, and the owner of a dog is not liable for damages resulting from the vicious or mischievous acts of the animal unless he had knowledge of his mischievous or vicious propensities, and such knowledge must be proved. * * * It is not enough to charge him that he might have known of the vicious or mischievous propensities of the dog by the exercise of reasonable care." In the instant case the evidence is far from sufficient to show the fact that the dog was possessed of vicious propensities and was apt to bite or injure humans.

The judgment of the Municipal Court of Chicago will therefore be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as an ultimate fact that the dog was not possessed of vicious propensities; and that the defendant had no knowledge that the dog was afflicted with rabies at the time of the injury to plaintiff.

MR. JUSTICE TAYLOR DISSENTS:

in this state, and is clearly apparent in the [illegible],
where the court said: "The natural presumption from the
habits of dogs is that they are tame, docile and tractable,
but as to property and property, and the owner of a dog is
not liable for damages resulting from the violence or mischiev-
ous acts of the animal unless he had knowledge of his vio-
lence or vicious propensities, and such knowledge must be
proven. * * * It is not enough to charge the fact to be might
have been of the vicious or mischievous propensities of the
dog by the exercise of reasonable care." In the instant case
the evidence is far from sufficient to show the fact that the
dog was possessed of vicious propensities and was apt to
bite or injure persons.

The judgment of the municipal court of Chicago
will therefore be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

ENTERED ON MOTION:

We find as an ultimate fact that the dog
was not habitually vicious propensities; and that the defend-
ant had no knowledge that the dog was afflicted with vicious
at the time of the injury in question.

Mr. JUSTICE FRANK MORAN:

33 - 24034

FERDINAND W. JANOS,

Plaintiff in Error,

vs.

EDWARD JOHANNING and
A. H. WERTZBERGER,
co-partners,

Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

214 I.A. 670

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, an attorney at law, brought suit for $328.50 for legal services claimed to have been rendered the defendants. It was admitted that of that sum $3.50 was due for drawing up certain articles of dissolution of a co-partnership. There have been two jury trials and in each instance a verdict and judgment for the plaintiff in the sum of $3.50.

It is the theory of the plaintiff that he rendered certain professional services for the defendants in a chancery proceeding brought against the defendants by the Schriver Laundry Co. which were worth $300.00 and, further, that legal services were rendered in a case entitled Riegards v. Johanning et al, in the Municipal court, which were worth $25.00. There is no dispute that the legal services rendered in the chancery proceeding were worth $300.00. It is the theory of the defendant, Johanning, that he made an agreement with the plaintiff that the latter was to receive his fees as attorney out of the injunction bond which

was to be filed in the case of Schriver Laundry Co. v. Hilborn, et al. and, further, that he did not owe $25.00 for services rendered in the case of Richards v. Johanning.

On the morning of June 8, 1909, about 9:00 o'clock Johanning went to the office of the plaintiff and showed him a notice requesting him, Johanning, to appear in the Circuit Court at 10:00 o'clock that day, on a motion for an injunction in the case of Schriver Laundry Co. v. Johanning, Hertzberger & Hilborn. The plaintiff drew up and filed an appearance, the appearance fee of $3.00 being paid by the defendant Johanning. The plaintiff obtained from the clerk's office a copy of the bill of complaint, and then went before Judge Mack, before whom the case was called. Upon motion of the plaintiff (Jarce) the court continued the matter until the next day. The matter came up, accordingly, on June 9, 1919, and an order was entered allowing the complainant to amend its bill of complaint, and a temporary injunction was issued. Immediately thereafter the plaintiff prepared answers and a large number of affidavits. Various appearances in court were made by the plaintiff in June, July and September, 1909. On October 6, 1909, the matter was referred to a master in chancery. The plaintiff appeared as attorney for the defendants before the master in chancery on several different occasions; at all of which evidence was taken. The matter was argued before the master and subsequently upon his making his report objections were filed thereto and thereafter were ordered by the chancellor to stand as exceptions. They were argued before the chancellor, and on February 15, 1910, the master's report was approved, a decree entered and an appeal prayed.

The defendant, Johanning, testified that he was in the laundry business; that the plaintiff had rendered him some services in the settling up of the estate of his mother-in-law; that on June 8, 1909, having received a notice to appear in court, in a matter in which the Schriver Laundry Co. was undertaking to get out an injunction against one of his drivers, he went to the plaintiff for professional service; that the plaintiff after looking at the notice said, "This is an injunction suit brought by the Schriver Laundry Co., trying to enjoin you from keeping that driver (Hilborn) on that route"; that he told the plaintiff "If that is all they want * * * why, let them have the injunction, the driver is nothing to me on that route" etc.; that the plaintiff said, "You will have to appear or they might get something out and get damages"; that he told the plaintiff they (meaning himself and his partner Wertzberger) were just starting out in business and had no money for litigation; that the plaintiff said "Dont bother about that. You know they have to give a bond. Any body that gets an injunction has got to give a bond of $500.00, and "I will show them that they can't keep that driver off of that route. I will attack that bond and I will take $300.00 for myself and I will get you $200.00; that he said he did not want money that way, that he would rather take the driver off the route and stop the litigation; that, however, if you can get $300.00," it will be up to you to get it but don't figure on getting me the $200.00 you promised"; that the plaintiff said "the money I want will take care of itself on the injunction suit." He further testified that the next day he took his driver, Hilborn, down to plaintiff's office and that the plaintiff told Hilborn not to "worry"

The difficulties, however, varied; for we
in his character twelve-year time the plausibility had grounded
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mathematics-lessons also on June 21, 1918, having presented a motion
to appoint in course, as a member to whom the financial journal
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you know you will get your money"; that if he spoke to him once he spoke to him ten or fifteen times in his office asking him for $50.00 or other amounts on account. On November 17, 1909, the plaintiff wrote to Johanning & Wertzberger stating that the injunction suit had been argued by him before the master in chancery and that the master had taken it under advisement and requested the production of authorities; that he would have "to prepare a brief for the master in that case and after the same has been filed he will render his report. I want you to send me $50.00 on account of services rendered in said case. If you can not send me $50.00 kindly send me such a sum as you are able. As you know the case is bitterly contested and I have laid out considerable of my money for necessary expense in and about the litigation of this suit;" that all he has ever received on account of legal services in the injunction suit is the sum of $13.00; that Wertzberger came to his office one day and said, "Mr. Jaros I came to pay you some money in the injunction case;" that Wertzberger brought out a check book and then said, "Mr. Jaros I can't pay you more than $13.00. I have just paid our help last Saturday and if I gave you a larger check it wouldn't go through"; that he received the check and gave a receipt therefor to Johanning & Wertzberger; that that was the only amount he ever received on account of the injunction suit; that in the Summer of 1909 he made requests of Johanning for fees, in the presence of Bessie Kasnalicky, a stenographer, Jarvis A. Blume and Robert K. Pendarvis, who occupied the same suite of offices with him, and also on January 25, 1910, in the presence of Wertzberger when the dissolution

of their copartnership was signed; that when the agreement for dissoultion was drawn up and signed, he told Johanning that it provided that he should pay all the debts and obligations outstanding against the copartnership and that he said, "Mr. Johanning, that includes my attorney's fees in the injunction suit"; that that was said in the presence of Wertberger; that Johanning, the defendant, said "all right I understand"; that after he served notice on the defendants of his withdrawal as their attorney, Johanning came to his office and asked him why he served notice on him; that he told him "now I have been working for you faithfully, I have spent a great deal of my time and money and you have repeatedly promised to pay me. I have paid the stenographer and you haven't done so. I can not go ahead in your case unless you pay something"; that Johanning then said "you know you will get your money you are not afraid I haven't got it now"; that he, the plaintiff, then answered "well you have told me that repeatedly"; that Johanning then asked "how much do you want, what are your fees"; that he, the plaintiff, said "I have earned $400.00 but if you will pay me $300.00 I will go on with the cases"; that Johanning then said "no I won't pay you unless I have to", something to that effect, and left the office.

Four other witnesses testified in corroboration of various parts of the testimony of the plaintiff. Jarvis A. Blume, attorney at law, who was in the same suite of offices with the plaintiff in 1909 and 1910, testified that he saw the defendant in the plaintiff's office a number of times; that he heard the plaintiff ask Johanning over the telephone for money on account of services rendered in the injunction suit; that he heard the plaintiff ask if he could not have $50.00 on account; that he, the witness,

of their importance was signed, that was the agreement for divorcing one dropped up the figure, he said declaring that it provided that he should pay all the costs and obligations outstanding against the mortgaged and that he paid, "Mr. Johnston, that includes my attorney's fees in the injunction suit"; that that was said in the presence of witnesses; that Johnston, the defendant, said "all right I understand"; that after he served notice on the defendants of his withdrawal as their attorney, Johnston came to his office and asked him why he served notice on him; that he said the "now I have been working for you FAITHFULLY, I have spent a great deal of my time and money and you have repeatedly promised to pay me. I have paid the expenses and you haven't done so. I am not go going to work unless you pay something"; that Johnston then said "you know you will get your money you are not afraid I haven't got it now"; that he, the plaintiff, then answered "will you have half or just fifteen?"; that Johnston then said "how much do you want, what are your fees"; that he, the plaintiff, said "I have worked FAITHFULLY but if you will pay me $300.00 I will go on with the case"; that Johnston then said "no I won't pay you unless I have to", something to that effect, and left the office.

That other witnesses testified to corroboration of various parts of the testimony of the plaintiff. Jervis M. Stone, attorney at law, who had in his own write if affidavs with the plaintiff in late and 1920, testified that he saw the defendant in the plaintiff's office a number of times; that he heard the defendant frequently ask the plaintiff the telephone the money or payment of overdue premiums in the injunction suit; that he heard the plaintiff ask if he

took the affidavits of a number of witnesses in connection with the injunction suit; that Johanning paid him $12.50 for notarial fees; that there were 39 or 40 affidavits; that his best recollection is that Johanning paid him between $12.00 and $14.00 in currency in his, the witness' office. The witness Bessie Kassalicky, the stenographer for the plaintiff, testified that she did all the work as typewriter in the Schriver Laundry Co. case; that she remembers distinctly the plaintiff asking Johanning for money on account of his fees; that she heard the plaintiff talk to him over the telephone a number of times; that the conversations were in connection with paying the plaintiff on account of services rendered; that that was in the Spring or Summer of 1909; that after that she saw Johanning in the plaintiff's office and the plaintiff asked him whether he could advance any money on his fees; that he was paying out a good deal of money and felt he ought to advance him some money; that Johanning stated that "he needn't be afraid he would get it but at the present time his money was all tied up in the business and he didn't have any"; that she heard him say that several times; that she served a notice of withdrawal from the injunction suit personally on him; that he told her to go back and tell the plaintiff "he was a ----- fool or something to that effect. He used some profane expression but I do not know what it was"; that subsequently he called at the office; that both the plaintiff and Mr. Pendurvis, an attorney, were there; that Johanning said "well now Jaros what do you want to go ahead and do a thing like this for"; that on one occasion when Johanning and Wertzberger were in the plaintiff's office she drew up a receipt on account for $13.00; that the receipt was as follows: "October 18, 1909, received of John-

ning and Wertzberger the sum of $13.00 by check on account;" that she heard Johanning ask Jaros what his fee would be in the injunction suit; that she drew the affidavits up; that she never heard any discussion or talk that the plaintiff was to take the injunction suit on a contingent fee.

The witness Pendarvis, an attorney at law, who was in the same suite of offices as the plaintiff testified that in the Spring of 1910, he was present when Johanning came to the office and asked the plaintiff "why did you do that, why did you send me that notice Mr. Jaros?"; that the latter said "I have to have some money, I have performed a lot of work in your case and I can not go on with it unless I have some money." "You promised to pay me some money and you haven't done it"; that Johanning then said "well I haven't had the money. I haven't been able to pay you. How much is your fee"; that the plaintiff then told him it was $500.00, although it was worth more and that he was out quite a sum for typewriting and stenographic services; that Johanning did not state that he would not pay the plaintiff.

The witness Wertzberger, called on his own behalf, who was a partner with the defendant in 1909 and 1910, and who subsequently sold his interest in the laundry business to Johanning, testified that he remembered the plaintiff being employed by the firm to look after the injunction suit; that he first went to the plaintiff's office four or five days after the injunction suit was started; that he remembered going to the plaintiff's office and paying money on account; that he had a conversation with his partner, Johanning, in which the latter told him that the plaintiff "should be paid

something on account", "the sum and substance of the conversation was that we had been bothered so much over the telephone for money on account that it began to get so we really hated to answer the telephone"; that Johanning said, ' guess we will have to pay him something on account'"; that as a matter of fact "the check was made out for $13.00 and I took it to Mr. Jarow"; that the check was signed by Johanning and himself; that the $13.00 was paid to the plaintiff at his office by him, Wertsberger; that the only suit they had at that time was the injunction suit; that the dissolution agreement was signed January 25, 1910, at the plaintiff's office; that at that time the plaintiff said to Johanning that "the assumption of the payment of the firms debts included his fees"; that the plaintiff made the statement "that as (meaning Johanning) should pay his fees."

As to the charge of $25.00, the evidence of the plaintiff is to the effect that, after Johanning stated that he was sued again in the Municipal court he, the plaintiff, took over the papers in the case of Richards v. Johanning, et al and told him that he was not going to do anything in the case unless he was paid $25.00 as a retainer and thereupon Johanning said, "I haven't it here but I will bring it; I will bring the money next day"; that he came again and said, "I haven't got the money but I have $6.00 to pay the jurors' fees"; that he paid the $6.00; that the plaintiff, after entering the appearance, made a motion for a rule that the plaintiff in that cause file a more specific affidavit of claim; that he (Jarow) prepared an affidavit of merits and interrogatories and filed them and subsequently made a motion for a rule for the plaintiff to answer the interrogatories. On the other hand, the defendant, Johanning,

existence on account", then one and indeed one of the impudence-
also was that we had been prepared to look upon even the ephemeral
for money as account that is began as you is not really being
.It appear the "illusions" that Schmelling would, " guess we
will have to pay him something on account"; that as a matter
of fact "the whole mess was not for $10,000 and I told it to
Mr. Jurey; that we have always was engaged by Schmelling and Rosenfeld;
that the $10,000 was paid as the plaintiff as his attorney by-
the, Schmelling; that the only will they had at that time
was the information only that the disqualification agreement was
signed Dempsey 18, 1926, as the plaintiff's attorney that at
that time the plaintiff was in ignorance that "the assumption
of the payment of the fifty dollars included the fifty"
that the plaintiff made the statement "that as for Jurey
Schmelling always pay his fees."

As to the change of $10,000, consideration of the
plaintiff is to the effect that, after Schmelling stated that he
was very upset in the contract would be, the plaintiff, that
ever happens to him was at Schmelling's discretion. He at
one time said he that is his not going to be supplied in the
same manner as was paid $10,000 as a payment was contemplated
Schmelling said, "I haven't it here but I will in my 30;
I will bring the money next day"; that he came again the
said, "I haven't got the money but I have $5,000 to pay the
Jurey Jurey; that he paid the $5,000; that the plaintiff,
after deducting the expenses, made a million for a fair that
the plaintiff is that some $100 a more specific difficult
of claim; that he filed prepared an affidavit of which
was interpretation was right that was not necessarily made
a claim the a suit for the plaintiff to assess the interpre-
tation. In the other hand, the defendant, contending,

testified, as to the $25.00 charge, that in the Spring of 1910 in the Richards case, he was sued for $250.00 for driver's wages; that he asked the plaintiff (Jaros), "Don't you think that could be settled without going into litigation?"; that the plaintiff said, "No. If you go down there you will admit you owe them and they will hold you up for the money"; that he then asked the plaintiff (Jaros) "What is your charge" and the latter said "I will charge you $25.00"; that he, Johanning, then said "that don't sound reasonable if I can go down there and give them the balance of $5.00 actually owed I will be saving nothing"; that the plaintiff said "you can do as you please"; that the case was called the week after the plaintiff's withdrawal as attorney; that he was compelled to employ another attorney.

We are of the opinion that this cause should be retried. After a very careful examination and analysis of the evidence we have reached the conclusion that the defendant, Johanning, manifestly, failed to prove with sufficient evidence the contract for a contingent fee. There are so many consistent circumstances testified to by the plaintiff, Blume, Pendarvis, Kasalicky, and Wertzberger that the evidence on the defendants' behalf is of very feeble probative force. Then, too, the trial judge erred in sustaining an objection to the question "What did Johanning say in answer to that"? Wertzberger having just testified that, on January 25, 1910, at plaintiff's office, when the plaintiff, Wertzberger and Johanning were present, and the dissolution agreement had been drawn

questions, as do the Gödel's theorem, that is the turning of this in the Gödelian sense, he was sent the Gödel's for history's sequence, that is where the plausibility [Lacan].

What's you mean that would be revolution of inner pulsing light [illegible]? Into the plausibility mean, "Ok. If you go down inside you will find you not that not they will make you the for the moment"; that is that makes the plausibility [Lacan] "that is your theory" and the listener made it also always you plausibility, that so, discussing, here made "that Gödel's sense remembers of I can go down theory and give them the lecture or [illegible] mathematic mean I will be working mathematic; that the plausibility made first the be on the plausibility; that the here not noticed the work after the listeners's sense Gödel so interesting that as you complicated to making listeners difference.

Gödel's of the sixteen that has made sense

by systems. After a very useful mathematics and analysis of the sciences we have studied the sequence that the distinction. Plausibility, modality, title is given with sufficient reference [illegible] for a mathematics. There are also many mathematic plausibility involved in the plausibility, Gödel's theorem. Commutativity, and [illegible] sign signature on the mathematics should be of very similar [illegible]. Then, Gödel's the least [illegible] sense is mentioning in difference of the [illegible]. "That the [illegible] was in answer to Gödel's [illegible] [illegible] [illegible], on January 28, 1971, at Lacan 1971's office, from the [illegible] [illegible] and [illegible] [illegible], and the differentiation [illegible] [illegible] [illegible]

up and was being signed, the plaintiff said to Johanning "that the assumption of the firm debts included his fees," it was entirely proper for the plaintiff then to ask, as he did, "what did Johanning answer to that". It was proper rebuttal, because Johanning had already testified on re-direct examination that "nothing was said in the case of the expenses of the Schriver Laundry case, nothing was mentioned." In view of what the plaintiff and Johanning testified took place at that conversation, it was only right that Hertzberger should be allowed to be examined on that subject. Also, the instruction containing the words "and if you believe that the plaintiff withdrew as attorney from said case without any just cause or reason, if any, for doing so", etc., was erroneous. There was evidence tending strongly to show that the plaintiff had at various times before he withdrew made demands for fees already earned, and that fact as a reason for with drawing, was ignored in the instruction, save as the jury might interpret it as a just cause or reason. In C. & St. L. R. R. Co. v. Koerner, 3 Ill. App. 248, the court said an attorney "may demand the payment of fees already earned, and that if not paid upon reasonable notice, he may withdraw from the case." The instruction ignores the evidence on that subject. Lloyd v. Matthews, 119 Ill. App. 546; Felver v. Judd, 81 Ill. App. 529. Johanning admitted that the plaintiff told him his charge in the Richard's case would be $25.00, and the plaintiff testified that before the withdrawal nothing had been paid. Under the instruction which was given how were the jury, without further enlightenment, to determine what con-

stituted "just cause or reason" for withdrawal? Although the cause has been tried twice, we do not feel that it would be just to affirm the present judgment.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Entered June 2

223 - 24148

N. P. LISHWOOD,

Appellee,

vs.

ACHARCH TOOL and MACHINERY COMPANY, a corp.,

Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

214 I.A. 670[3]

MR. JUSTICE TAFT delivered the opinion of the court.

On September 2, 1915, the complainant brought suit against the defendant for an accounting alleging the breach of a certain written contract which involved both employment and an interest in the business.

The evidence shows the following: For a period just prior to January 4, 1914, the complainant had been working as a general salesman for the Aermore Manufacturing Company. That company was in the business of selling automobile accessories such as horns, dimmers and lift-a-lites. Those particular accessories were manufactured by the defendant company and sold by them to the Aermore Manufacturing Company. The business of the defendant at that time was the manufacture of tools, dies, automobile accessories, etc. At that time the defendant company did not have what is called an accessory department. On January 4, 1914, the complainant and the defendant entered into an oral agreement which provided, among other things, that the complainant should manage an accessory department for the defendant,

which department would deal in horns, dimmers, lift-a-lites and automobile accessories. It was provided that he should receive a salary of $150.00 a month, if the receipts of the accessory department justified it, and if they did not, that he should have a drawing account of $12.50 a week; also that he should have a percentage of the profits. The complainant worked under the oral agreement until November 25, 1914, at which time an accounting was had and it was found that there was a loss in the accessory department of $491.13. In determining that loss, certain expenditures, or running expenses as they were called, including bookkeeping, telephone, insurance, postage, stationery, printing, attorney's fees, commissions, electrotyping, lithographing, tools, dies and patterns were charged against the accessory department. On November 25, 1914, the parties entered into a written contract the material parts of which are as follows:

> "The party of the first part (defendant) to pay unto the party of the second part (complainant) the sum of $12.50 per week until such time that the sum of $491.13, now a charge on the books of the company against the above named accessories and the running expenses connected therewith, is fully paid. When said sum of $491.13, together with the running expense, has been fully paid, to pay said second party (complainant) the sum of $18.75 per week, provided the gross profits shall amount to $18.75 per week; otherwise the party of the second part (complainant) is to receive $12.50 per week.
>
> To pay to said party of the second part (complainant) 75% of the net profits and to retain 25% of the net profits until the sum of $250.00 shall have accumulated and credited on the books of the company as a reserve fund. After the reserve fund of $250.00 has accumulated party of the first part (defendant) is to pay party of the second part (complainant) the whole of the net profits derived from the sale of the accessories until the back salary (meaning thereby the difference between the drawing account and the salary account of $150.00 per month, computing the same from January 4, 1914, has been fully paid.
>
> When said sum of $491.13 has been fully paid to the party of the first part (defendant) the reserve fund of $250.00 accumulated, and said party of the first part (defendant) having been reimbursed

for any and all money advanced or expended and paid in full for all material together with other expenses connected with the sale or manufacture of the accessories above mentioned, and after party of the second part (complainant) has received the back salary above referred to, then and in that event the said party of the second part (complainant) is to receive one fourth interest in the above named accessories * * *.

It is further mutually agreed by and between the parties hereto that if by August 1, 1915, the gross profits from the sale of the accessories have not paid the drawing account and running expenses then this agreement shall, at the option of the parties hereto, be declared null and void."

Pursuant to the terms of the written contract, the complainant remained in the employment of the defendant and drew compensation on account of salary at the rate of $12.50 a week until about April 17, 1915. By that time the defendant had been reimbursed the amount of the deficit of $491.13, and had been paid the current running expenses of the accessory department, all out of the sales of that department. After April 17, 1915, pursuant to the terms of the written contract, the drawing account of the complainant was increased to $18.75 per week. That amount was drawn by him weekly for a period of sixteen weeks. On May 10, 1915, the so-called reserve fund, mentioned in the contract, of $250.00, had accumulated, and also an additional sum of $300.00. As a result of that accumulation, the defendant then paid to the complainant, on account of back salary, which was provided for in the contract, the sum of $300.00, and on June 30, 1915, from the same source, the complainant was paid, on account of back salary, another $300.00. Some time between July 15, and July 20, 1915, the complainant, claiming that something like $600.00 or $700.00 had been accumulated, asked the officers of the defendant company for a check. On August 26, 1915, the defendant notified the complainant in writing as follows:

"In regard to our contract with you of November 25th, 1914, you are hereby notified that an audit of the accounts, to August 1st, 1915, of the automobile accessories specified in said contract, shows that we are manufacturing said articles at a loss, and we have therefore, elected to, and have cancelled said contract, in accordance with its terms. You are further notified that your account with us under said contract is overdrawn in the sum of $600.00, which amount you will please remit to us."

Subsequently the parties met and undertook to reach a satisfactory settlement as to the account, but failed owing to the fact that the defendant claimed that it was entitled, under the terms of the written contract and in making up the account to be credited with certain "overhead expenses" or "administration" charges. The complainant claimed that those particular overhead charges were not proper and were not covered by the written contract. There was no settlement and the complainant instituted these proceedings. The bill of complaint prayed for an accounting. The defendant filed an answer, claiming among other things, that the manufacture of the accessories was unprofitable and that the contract was for that reason cancelled. The defendant filed, also, a cross bill setting up the written contract and praying for a return of the $600.00 which it was claimed it had overpaid the complainant. After a replication was filed, the matter was referred to a master in chancery, who found the account to be as follows:

"Gross receipts from sale of accessories		$6136.76
Cost of accessories to accessory department.....		2984.22
Gross profits.....		$3152.52
Expenses of accessory department:		
Agreed balance, referred to in written agreement.....	$491.13	
Running expenses.....	454.76	
Drawing account.....	512.50	
	$1488.39	1488.39
Net profits.....		$1664.15"

He further found that "on August 1, 1915, there was due to the complainant in full for balance of back salary (after allowing defendant credit for sales on account) the sum of $1043.75." The defendant filed elaborate exceptions to the master's report. They were overruled by the chancellor and a decree entered approving and confirming the master's report.

It is the contention of the defendant that the court erred in holding that the net profits - the phrase used in the written contract - should be determined without allowing the defendant credit for so-called "overhead" or "administration" expenses. Of course, the phrase net profits, generally means that which remains as gain in business transactions after all costs and expenses have been accounted for. Evidence was offered and considered by the master in order to determine the meaning of the words, net profits, as used in the contract in question. The complainant testified for himself; and on behalf of the defendant, one Dohen, the president and treasurer of the defendant; one Sears, a stockholder of the defendant, and one Dunham, a public accountant, who did some bookkeeping from time to time for the defendant, were witnesses. The evidence shows that the parties hereto had been conducting the accessory department with the complainant as sales manager for a period of ten months prior to the signing of the written contract in question, and it is admitted that in their relations under the oral contract, so-called "overhead" or administration" expenses were not charged.

The complainant testified that "the net profits are the profits after the running expenses and the cost of materials to the accessory department and my drawing account has been de-

ducted from the gross profits." As to the gross profits, he testified that in a conversation with Deben or Smrz, it was stated by one of them "that the gross profits was the difference between the selling price and the price at which the articles were delivered to the accessory department." Further, the complainant testified that the schedule of prices at which the articles were charged was the same as that made the Aermore Manufacturing Co. and that the overhead and administration expenses had already been included in these prices. On the other hand it is contended by the defendant's counsel that no fixed prices at which the complainant should handle the accessories, were ever agreed upon. The master found that at the time of the institution of the accessory department, in January 1914, there was a definite agreement as to the prices at which the so-called accessories were to be delivered to the accessory department and that they were: No. 1 horn $1.18; No. 2 horn 94¢; No. 3 horn 90¢; No. 4 horn 68¢, etc. The defendant disputes the conclusion of the master and contends that the prices just mentioned represented only the cost of manufacture and did not include any sum for what is commercially known as overhead and administration expenses, and, further, that it was entitled to charge against the accessory department prices in excess of those just quoted according to the increased cost of labor.

After hearing the witnesses and considering the testimony the master concluded that "it was not the intention of the parties in said written agreement to include "overhead" and "administration" expenses in the terms "running expenses"

or expenses connected with the sale or manufacturing of accessories," etc. In the course of the hearings the master gave the defendant an opportunity to put in proof of any increase in the cost of labor or material in the manufacture of said accessories. The defendant, however, declined the offer. It would be superfluous to set forth, here, an extended statement of the evidence bearing upon the meaning of the words, net profits, as they stand in the written contract. There is ample evidence in the record, on the part of the complainant, justifying the conclusion of the master and the chancellor, that the meaning of the words - considering the context and the circumstances at the time of the execution of the contract - exclude all charges for overhead or administration expenses. Quite strong evidence favoring the complainant's contention is the fact that on two separate occasions payments were made to him by the defendant which could only have been made on the theory that overhead charges were to be excluded.

After a careful reading of the record, we believe the evidence sufficiently shows that at the time the written agreement was entered into, the prices at which the accessories were to be delivered to the accessory department were as stated by the complainant. We are of the opinion further that when the minds of the parties met as to the meaning of the phrase, net profits, in the written contract in question, it was that they should be determined exclusive of the so-called overhead and administration expenses. In Young V. Farwell, 46 Ill. App. 299, it is said: "Courts may and should in cases of doubt give to words contractually employed such a meaning as will effectuate the intention of the parties, when such intention may be gathered from all the circumstances surrounding

the transaction," etc. There is no doubt that, according to the testimony of Bobes and Carr, it was expressly understood at the time the written contract in question was entered into that the phrase, net profits, meant that all overhead and administration expenses should first be charged. But, the witnesses are not before us, and we are not in the position in which the master was, who heard the witnesses; and as the determination of this whole matter is very much dependent upon the credibility of the witnesses, and as there are so many circumstances shown by the record that are consistent with the testimony, evidence and contention of the complainant, we are not reasonably justified in concluding that the master and the chancellor erred. McCormick v. Miller, 102 Ill. 209; Bouton v. Cameron, 205 Ill. 50; Spacy v. Ritter, 214 Ill. 266; Gillespie v. Patrick, 146 Ill. App. 290.

Finding no material error in the record the judgment is affirmed.

AFFIRMED.

Certiorari denied

354 - 24291

LOUIS B. KLINGMAN and L. F. KLINGMAN, doing business as L. F. KLINGMAN & CO., Appellees,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
JOHN F. HIGGINS, Appellant.	

214 I.A. 670[4]

MR. JUSTICE TAYLOR delivered the opinion of the court.

On February 2, 1912, a judgment by confession in the sum of $6,836.34 was entered in the Circuit Court in favor of the plaintiffs and against the defendant upon three promissory notes, the first dated April 27, 1909, for the sum of $1,531.65, signed "John F. Higgins", the second dated June 26, 1909, for the sum of $[illegible] signed "John F. Higgins", the third dated August 2, 1911, in the sum of $4,000.00 signed "John F. Higgins by J. Frank Higgins, attorney in fact, Power of attorney filed with the corporation."

March 4, 1912, an order was entered pursuant to a motion of the defendant "that leave be and the same is hereby given the defendant to plead to the plaintiffs' declaration filed in said cause within six days from this date the judgment heretofore by confession rendered herein stand as security." On March 9, 1912, the defendant filed a plea of the general issue and a plea denying execution of the notes and denying that the defendant executed

the power of attorney to any one to execute any of said notes. On June 3, 1912, the plaintiffs filed replications, and a similiter to the plea of the general issue. In the second replication to the second plea the plaintiffs set up that the said defendant received from the plaintiff the full consideration of said notes, and for a long space of time prior to the execution of said notes the defendant suffered and permitted one J. Frank Higgins to execute notes for and on behalf of said defendant, to manage and transact the defendant's business and to sign all contracts, documents, papers, notes etc., pertaining to said business, and suffered and permitted said J. Frank Higgins to obtain from the plaintiffs large sums of money upon notes and assignments of claims, the proceeds of which notes and assignments were received by the said defendant. On April 8, 1914, the defendant filed a plea alleging that the notes mentioned in the declaration were made without any good and valuable consideration. A replication to that plea was filed on April 10, 1914. On June 8, 1914, the cause was tried before a jury and on June 22, 1914, a verdict rendered in favor of the plaintiffs in the sum of $7,647.15. On June 28,1916, a motion for a new trial was granted, and on March 29, 1916, on motion and affidavit of the defendant, a change of venue was granted from Judge Monore and the cause assigned to Judge Torrison. On June 19, 1916, plaintiffs, having obtained leave filed additional counts to the declaration; consisting of the common counts with a copy of the account sued on attached thereto. On July 1, 1916, the defendant pleaded the general issue and the statute of limitations: and, on January 29, 1917, the plaintiffs filed a similiter to the first plea and a replication to the other. On December 19, 1917, the second jury trial

was begun.

The substance of the evidence introduced is as follows: The defendant, John F. Higgins, was the owner of a printing business in Chicago and for many years furnished printed matter for the City Comptroller and the City of Chicago. One Frank G. Higgins, was manager. From time to time between 1906 and about August, 1911, the defendant had been in the habit of assigning and selling bills for printing, which he had against the City of Chicago or some department thereof, to the plaintiffs. That was done in order to obtain money for payrolls and the general conduct of his printing business. J. Frank Higgins, whose relationship is not shown, had such complete charge of the business as manager for the defendant, that over a long period of time he was in the habit of signing the name of John F. Higgins to the assignments and, also, to the powers of attorney which were necessary in order that the money from the city or other customers might be turned directly over to the plaintiffs. Attached to each bill there would be an assignment to the plaintiffs of certain money due from the City of Chicago, and, underneath, a guarantee that the particular amount had not been assigned to any one else, and that the particular statement made was for the purpose of obtaining an equivalent sum of money from the plaintiff; it also constituted the plaintiffs, or one of them, attorney to collect the amount and to endorse the voucher, certificate, order, warrant or check to be issued. The money which J. Frank Higgins received, from time to time, as manager for John F. Higgins, from the plaintiffs upon an assignment of accounts or bills, was deposited by him to the credit of the defendant, John F. Higgins, in the Hiber-

the tenant.

The economics of the business relationship is an
interest. The interchange, which P. Blau calls, was the result of
a variety of methods in the world and the very people involved
pointed out that the idea "independence and the fear of
dependence." Jay Steven B. Dillingham, was discussed. Even then
he knew because 2000 was almost August, 1971, the interview
was not long since he his health of wellbeing was nothing but in the
beginning, and it is not against the law of Illinois as been
implicated charged, in the plaintiffs. There was lack in which
he tried hard for physicians and the medical department of the
plaintiff hospital. A. Fredo Dillingham, were principally in
all cases, but well concerned change of the business in another
the interest, that were a long period of time he was in the
hands of eligible the case of John P. Dillingham. The medical
cases only also, in the course of attorney which their business
and in order that the money Ever the are a case of Dillingham
Hospital in the plaintiffs. Dillingham
he-also said that should be in medicine of the plaintiff
of medical money was then the lord of Dillingham, not immediately,
a question that the physicians should not act such critical
to my mind also, not that the physicians should be
for the purpose of relieving an existence one of money Even
the plaintiff in view considered the plaintiff, as one of
them, claiming to which the course was to remove the
medical medicine, other, neither an claim to be issued.
The money which P. Dillingham provided, then time is than,
in money for the P. Dillingham from the plaintiff was
a matter of business of business or until, was dispatched to the
in the course of the defendant, John P. Dillingham, in the things

nian Bank. On that account J. Frank Higgins drew checks and, from time to time, as he testified, signed the name of the defendant, John F. Higgins. There was offered in evidence a large number of checks made by the plaintiffs payable to John F. Higgins between March, 1907 and May 1908, aggregating over $16,000.00; all of which were paid through the Chicago Clearing House and credited in the Hibernian Bank to the account of John F. Higgins. The note dated April 27, 1909 for $1,531.65 and which was payable to the order of the plaintiffs was signed "John F. Higgins" by J. Frank Higgins, and was given in order that a check from the City Comptroller's office might go to the defendant instead of the plaintiffs. The $800.00 note was given to the plaintiffs for a check for a like amount; J. Frank Higgins having informed L. V. Clingman that John F. Higgins needed money in the printing establishment for the payroll and for paper. J. Frank Higgins testified that he thought that the note of $800.00 was executed by him as manager for John F. Higgins in the transaction of his business. He further testified that, according to his recollection, the two notes, the one for $800.00 and the one for $1,531.65 were paid and satisfied but were not returned. His testimony is, "I would'nt say that positively but that is my recollection."

The evidence of L. B. Clingman is to the effect that when he first met the Higginses, John F. Higgins said, "Frank is manager and he can bring the bills in to you and you get the cash for them"; that "Frank is the manager and you can do the same as with me;" "I think John F. Higgins was away most of the time and most of the business was done

this bank. In this account J. Frank Hughes drew checks and, from time to time, as he testified, signed the name of the defendant, John T. Hughes. There was offered in evidence a large number of checks made by the plaintiffs payable to John T. Hughes between [illegible], 1917 and [illegible] 1918, aggregating over $16,000, all of which were paid through the Chicago Clearing House and credited to the [illegible] bank to the account of John T. Hughes. The note dated April 27 [illegible] for $3,000.00 [illegible] payable to the order of the plaintiffs was signed "John T. Hughes" by J. Frank Hughes, and was given to obtain cash a month from the [illegible] [illegible] [illegible] the [illegible] [illegible] of the plaintiffs. The [illegible] note was given to the plaintiffs for a [illegible] [illegible] [illegible]; J. Frank Hughes having [illegible] [illegible] that John T. Hughes would [illegible] in the [illegible] [illegible] for the [illegible] and the [illegible]. J. Frank Hughes testified that he thought that the note of [illegible] was executed by him as [illegible] for John T. Hughes in the [illegible] of his business. He further testified that, according to his [illegible], the [illegible] [illegible], [illegible] [illegible] and [illegible] the [illegible] [illegible] was [illegible] but were not [illegible]. The [illegible] is, "I wouldn't say that positively but that is my recollection."

The evidence of [illegible] is to the effect that when he [illegible] the [illegible], John T. Hughes said, "[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]" [illegible] John T. Hughes [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

with J. Frank Higgins"; that during the last five or six years he went to the printing office of the defendant dozens of times and that John F. Higgins would not be there once in twenty times; that on one occasion in 1910, or the first part of 1911, John F. Higgins called up and said that Frank was out of town and wanted to know if we would send them some money to meet the payroll of Saturday; that accordingly he gave him a check; that in 1910 he had a conversation with John F. Higgins in regard to settling up the account; that he then told him that a number of bills were made over in the Comptroller's office without a power of attorney, and that he could'nt find anything to correspond to them in the way of assignments although the plaintiffs had already given checks for them; that finally on May 9, 1910, J. Frank Higgins gave him a check for $4,000.00 on the Hibernian Banking Association payable to the order of L. B. Clingman & Co. and signed John F. Higgins & Co.; that he deposited the check in the Hibernian Bank and it was returned marked "no funds"; that he then saw J. Frank Higgins and asked him why he gave him a check that wasn't good; that he said it was a mistake, and further, that he gave the check for money due on the bills, that is, on account; that he then gave him a second check dated May 21, 1910, for $4,000.00 drawn on the Hibernian Banking Association payable to the order of L. B. Clingman & Co. and signed John F. Higgins; that upon presentation that check also was refused payment; that subsequently, to take the place of the check, J. Frank Higgins gave him the note for $4,000.00, being one of the notes attached to the declaration; that that note was never paid; that there is due altogether the amount of the three notes.

[illegible]

[illegible]

[illegible]

The evidence of Lewis F. Clingman, the father - and which corroborates the testimony of his son - is to the effect that he was at the defendant's place of business several times in 1909 and 1910 and talked to the defendant; that the latter said he would have to see Frank about that business; that later when he told the defendant that he wanted to get a settlement of the account the latter said he would have to see Frank about it; that the check for $4,000.00 was not in final settlement but in part payment of the account.

A power of attorney, dated January 4, 1910, purporting to be signed by "John F. Higgins", the defendant, witnessed by the signature and seals of W. B. Bain and W. L. Ahern, and acknowledged before Daniel E. Sherman a Notary Public, was introduced in evidence. It made J. Frank Higgins the lawful attorney of the defendant and authorized him, inter alia, "to execute and sign notes". One Herman Meyer, a clerk, testified that in his opinion the signature to the power of attorney was not that of John F. Higgins. Pink, superintendent for the defendant, testified that the signature to the power of attorney was in the handwriting of J. Frank Higgins. Van Inwegen, office man for the defendant, testified that the signature was not that of the defendant. On the other hand L. B. Clingman testified that when they first began doing business with the defendant in 1906 or 1907, he had a conversation with the defendant and the latter said "the power of attorney was over in the City Hall and that Frank could act for him as manager;" that he saw one in the City Hall about that time; that the one introduced in evidence is the third one; that the signature to the power

The relations of Jacob K. Javits, the Senator's [illegible] - is so [illegible] [illegible] [illegible]

of attorney which was offered in evidence is that of the defendant. The defendant himself testified that the signature was not his, that it is the handwriting of "J. Frank Higgins". Bain, who was confidential secretary for the defendant, for over ten years, testified - somewhat ambiguously - that he had seen the defendant's signature every day, and that the signature in question is the signature of the defendant, and that in his opinion it looked very much like J. Frank Higgins' writing. He could imitate John F. Higgins very well." As to the signature to the acknowledgment of the power of attorney, Sherman, who purported to sign and seal it, testified the signature was not his, though the seal might be.

On December 20, 1917, at the close of the evidence, and after being instructed, the jury brought in a verdict in the sum of $9,256.73 in favor of the plaintiffs; and on January 18, 1918, after a motion for a new trial, made by the defendant, had been overruled, Judge Windes entered the following order: "Therefore it is considered by the court that the judgment heretofore on the 2nd day of February, A. D. 1912, rendered herein in favor of the plaintiffs and against the defendant for the sum of six thousand eight hundred thirty six dollars and thirty four cents ($6,836.34) stand in full force and effect as of the date of rendition of said judgment," etc. From that judgment this appeal is taken.

We are of the opinion that the jury on the evidence presented were justified in their verdict. The defendant and J. Frank Higgins had the same initials, J. Frank Higgins stated that his name was John F. Higgins, which is the same as that of the defendant, but that he did not ordinarily sign in that way. He managed the printing business almost to the ex-

clusion of the defendant. The latter had other interests. Practically all of the many dealings with the plaintiffs were conducted by J. Frank Higgins. He made the assignments; signed the powers of attorney; generally received the checks for the accounts assigned; endorsed them in the name of the defendant; deposited them in the bank to the credit of the defendant, and drew checks on that account, signing thereto the name of the defendant. L. B. Clingman says that when he went in the printing office the defendant would not be there once in twenty times. Louis P. Clingman stated that in 1909 and 1910 he talked to the defendant and the latter said he would have to see J. Frank Higgins. L. B. Clingman stated that in 1906 or 1907 he had a conversation with the defendant and the latter said "the power of attorney was over in the City Hall and that Frank could act for him as manager"; further, that he saw a power of attorney in the City Hall about that time; that the one introduced in evidence was the third one. Of course, the evidence concerning the power of attorney, dated January 4, 1910, is in conflict. There are a number of suspicious circumstances about it; but, it, together with all the other evidence, was submitted to the jury. Then there is the fact that the defendant no where in the record denies that he got the money. As the counsel for the defendant state in their brief, "the only evidence offered by the defendant in this case related to the alleged power of attorney", etc. The question was one of fact and we are of the opinion that the jury were justified in finding that J. Frank Higgins was sufficiently authorized and that the defendant was liable. Hurd v. Harple, 10 Ill. App. 418; 31 Cyc. 1382; Nash v. Glassen, 163 Ill. 409.

It is contended, further, by the defendant that if any of the indebtedness of the defendant to the plaintiffs was not evidenced by writing, it was barred by the statute of limita-

-2-

signing of the indenture. The latter had never experienced, fundamentally all of the army clothing with the qualifications were recognized by J. Frank Dingman. In order the overpowering signs the powers of discretion, generally, previously the single The his attorneys employed, endeavoring that in the case of the authorized; operations case in the land in the crowds of the authorized, and have number in their accounts, allowing charging the case of the indentures. In. Mr. Dingman says that when he went in the landing with the authorized would not be above was in newly place. Again Mr. Dingman stated that in July 1916 he broke in the indenture and the latter said he would sign it in the J. Frank Dingman. In. Mr. Dingman stated that in June or July he had a conversation with the defendant and the Taylor with "the power of attorney was with Mr Mr Dingman" that the Frank would sign "for the benefit of Dingman's interest, that he was a power of attorney in the Mr Mr Dingman, that he was authorized in witness the Mr Mr Dingman. Mr counsel, the witness concerning the power of attorney, John Dunning v. Mr, is in evidence. There are a number of conversations between Mr Mr, Mr, Mr Dingman this all the other expressions was admitted in the jury. That since is the time when the defendant to show Mr the signed Dingman the authorized to get the money. In the counsel for the defendant stated in their brief, "the only witness offered by the plaintiff in this case being the signed power of attorney", viz. "the execution was one of fact and no more of the execution that he just were justified in signing that J. Frank Dingman was authorized contracting the case the defendant was liable. Mr v. Dunning, 21 Ill. App. 631; Mr v. Dingman, 192 Ill. 449.

It is material, further, to the defendant that if the indentures of the plaintiff in the plaintiff's [illegible] the [illegible] of the plaintiff [illegible]

tions. The confession of judgment was entered on February 2, 1912, and the additional counts to the declaration, consisting of the common counts, were filed June 19, 1916. The argument of counsel for the defendant is that whatever was due five years prior to June 19, 1916, was outlawed. With that we cannot agree. Certainly it would be unreasonable, in a case such as this, where the original judgment is entered on February 2, 1912, and the judgment is then allowed to stand as security, and the defendant given leave to plead, and prove that he is not bound equitably to pay the judgment, to take into consideration, as bearing upon the plaintiff's right to their judgment, any lapse of time after the entry of the original judgment, that is, pendente lite, merely because, as a matter of formal procedure, the plaintiff did not file the appropriate technical form of declaration until more than five years after the time the money was due for which the judgment was entered.

As the statute of limitations pertains only to the remedy, and as the time had not run when the plaintiff obtained his judgment by confession, the plea would not then have been good. And, so, where the judgment stands, as here, the court is not interested in technical matters pertaining solely to the original or subsequent form of the declaration. The chief question is, does the defendant owe the debt, and not does the proof correspond with the declaration. The plea of the statute, here, may be said to be an admission that the debt was due, not only when the judgment was entered, but long afterwards; but, as the time that had expired when the common counts were filed exceeded five years, the plaintiff's remedy was then barred. Not that it was barred when the judgment actually was entered, but at a much later date. We are of the opinion that the

that the plea of the Statute of Limitations, under the circumstances, was inapt.

We have examined the objections which have been made concerning the instructions, but, in the view we take of the cause, do not find any of them tenable.

Finding no material error in the record the judgment is affirmed.

AFFIRMED.

126 - 24432

HENRY HOMMER AND COMPANY, a corporation, Appellant, vs. FRANK WALENGA AND MARY WALENGA, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 670

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit for the sum of $154.46, the balance of an account claimed to be due from the defendants for the sale of certain canned goods. The defendant, Frank Walenga - the suit being dismissed as to Mary Walenga - filed an affidavit of merits setting up that the plaintiff failed and refused to deliver to him "all of the merchandise bought from it" and denied that he was indebted to the plaintiff as alleged in the statement of claim. Subsequently the defendant filed a statement of claim in the nature of a set-off "for damages for breach of contract by the plaintiff as follows: On towit, May 22, 1916, the plaintiff entered into a contract with the defendant, Frank Walenga, whereby plaintiff agreed to sell and deliver to said defendant 100 cases of #2 canned tomatoes at .77-1/2¢ per dozen cans, and 50 cases of #3 canned tomatoes at $1.00 per dozen cans, which defendant then and there agreed to pay for as provided in said contract; plaintiff thereafter delivered 55 cases of said #2 canned tomatoes, but, though often requested has failed and refused to deliver the balance of said tomatoes as

agreed, whereby said defendant has been compelled to purchase said tomatoes in the open market to the damage of defendant in the sum of Two Hundred Dollars ($200.00) The plaintiff then filed an affidavit of merits, in answer to the claim of set-off, substantially as follows: "that said plaintiff, Henry Horner and Company, and said defendant, Frank Walenga, never entered into any contract agreeing to sell and deliver to said defendant one hundred (100) cases of No. 2 canned tomatoes, or fifty (50) cases of No. 3 canned tomatoes at 77-1/2¢ per dozen, and $1.00 per dozen respectively, under date of May 22, 1916, or any other date." "That on or about May 22, 1916, it received an order or salesmen's memorandum for (100) one hundred cases of No. 2 canned tomatoes, and fifty (50) cases No. 3 canned tomatoes at 77-1/2¢ per dozen and $1.00 per dozen respectively, for future delivery to Frank Walenga, defendant herein, same being accepted conditionally." "That defendant was buying under a ($300.00) three hundred dollar guarantee signed by his mother, Mrs. Mary Walenga, and that his account had far exceeded the credit limit, and was not in such a condition as to warrant any further extension of credit, and that for said reason no pro rata delivery was made on the unaccepted order for fifty (50) cases No. 3 canned tomatoes," and denying "that its suit brought herein is brought to recover for a part of the merchandise delivered under said pupposed contract as set up by defendant in its affidavit of claim on set-off", but alleged that plaintiff's suit is brought to recover the balance due for merchandise sold and delivered at his request.

The evidence shows substantially the following:

The solution where mathematically the relative

The indebtedness of the defendant to the plaintiff in July, 1917, outside of any matter of set-off, was the sum of $184.46. The defendant, when making the last payment on account, the sum of $25.00, some time in July, 1917, admitted that the amount of $184.46 was due but claimed an allowance for the non delivery of said tomatoes. The defendant was in business at 1330 Houston avenue where he conducted a grocery and meat market. On May 22, 1916, one Gerber, a salesman for the plaintiff, called on the defendant and the latter gave him an order for certain canned goods for future delivery. The order was as follows: "100 C.2 Kan Tomatoes .77-1/2 to be shipped in four shipments; 50 C. 3 Habit Tomatoes 1.00; 5 C. Blvd. Sweet Peas 1.65; 10 C. Habit 2's Corn .75; Original Future Contract shipper made. Future Del."

The five cans of peas and the ten cans of corn were shipped by the plaintiff to the defendant and also, on November 8, 1916, sixty-five cans of No. 2 tomatoes leaving unshipped 35 cases of No. 2 and the 50 cases of No. 3. The defendant and his wife both testified that about the middle of December, 1916, one Weber, at the place of business of the plaintiff, told him, the defendant, he would send out part of the order for tomatoes in the next shipment; "that Horner's trucks made delivery every week in Hegewisch." The defendant, further, testified, that when the tomatoes did not arrive he bought in the open market; that the market value of No. 2 tomatoes in the latter part of December, 1916, was $1.65 per dozen and No. 3 tomatoes $3.25 per dozen; that he knew that it was a trade custom that future orders were subject to pro rata delivery butthat he did not sign a contract calling for pro rata delivery; that he put in an order on a regular order form. He admitted that he had received sixty-five

cases of No. 2 canned tomatoes on November 10, 1916, and that an invoice was left with him on which were the words: "65 Cases #2 Kan Tomatoes, 65 77-1/2c, $100.75. Completes your future order for this item."

In regard to the words "completes your future order for this item", defendant testified "that he did not think Horner had any right to say whether he should get any more; that he had ordered the goods and wanted them." Upon cross examination of the defendant counsel for the plaintiff undertook to examine him concerning whether his account in December, 1916, did not exceed the sum of $300.00, and, also, whether when he opened up his account with the plaintiff he arranged with the plaintiff for a line of credit up to $300.00 with his mother as a guarantor. The trial judge ruled that such evidence was incompetent. Counsel for the plaintiff offered to show that the defendant was buying from the plaintiff under a $300.00 guaranty; that his account during the months of November and December, 1916, and for some time thereafter, was in excess of $300.00; that he was working under a guaranty signed by his mother, Mary Walenga, for a sum not exceeding $300.00; that the financial condition of Walenga during November and December, 1916, and for some time thereafter, was not in such condition as to warrant any further shipment of goods to him. Objection, thereto, was made, and sustained by the court.

On behalf of the plaintiff, in rebuttal, one Stretch, country credit man for the plaintiff, was asked whether or not the account of the defendant was in such condition as to justify any further shipment of goods and merchandise, having reference to the guaranty of $300.00 signed

by defendant's mother. An objection being made, however, the trial judge refused to allow the question to be asked. Counsel for the plaintiff then, offered to show that the defendants account of November and December, 1916, was considerably in excess of $300.00 and that the defendant was buying of the plaintiff under a guaranty of $300.00; that his credit, standing and rating did not justify any further extension of credit; that he was unable to pay his past due account and was insolvent. Upon an objection being made by counsel for the defendant the trial judge refused to admit the evidence. The trial judge ruled that evidence as to the financial condition of the defendant was immaterial.

The cause was tried before a jury and they brought in the following verdict: "We, the jury, find the issues against the plaintiff on defendant's claim of set-off and assess the defendant's damages at the sum of $101.79." On February 16, 1918, the court remitted $100.00 of the verdict and entered judgment "on the verdict on defendant's claim of set-off, and that the defendant have and recover of and from the plaintiff the damages of the defendant on said defendant's claim of set-off in the sum of one and seventy-nine one hundredth dollars ($1.79) in form as aforesaid assessed together with the costs by the defendant herein expended, and that execution issue therefor."

The brief of appellant presents two questions for consideration: (1) Whether or not plaintiff was excused from making delivery by the circumstance that the defendant was more than $300.00 behind in his payments for the installments of goods already delivered and though repeatedly requested to make payments had been unable to do so. (2)

Whether certain facts sought to be proved by the plaintiff and excluded by the court were admissible.

As to the first question, we are of the opinion that as, at the time when it is claimed the plaintiff failed to make further delivery of tomatoes, defendant had not paid for the merchandise he had already received under the contract, the plaintiff was justified in refusing further deliveries. The contract in the present case was a single one, but "divisible, separable and apportionable." As Mr. Justice Baker said in North Shore Lumber Co. v. South Side Lumber Co., 176 Ill. 96; "Confusion is often caused by failure to observe the distinction between several contracts and a divisible, separable or an apportionable contract. And an apportionable contract enables a certain part of the payment or performance on one side to be recovered before the whole consideration has been given by the other side but there is nevertheless but a single contract." Where the purchaser under such a contract as the one here considered has refused to pay for installments already delivered the seller is justified in refusing to make further deliveries. Burt v. Garden City Sand Co., 237 Ill. 473; Chicago Coal Co. v. Whitsett, 278 Ill. 623; North Shore Lumber Co. v. South Side Lumber Co., supra; Genesee Fruit Co. v. Barrett, 67 Ill. App. 673; Vieder v. Lemke, 40 Ill. App. 396.

The contract was made on May 22, 1916. It was a single contract to deliver a certain specified amount of merchandise. The time it was to be delivered was not specified. The defendant testified, "I gave an order for some canned goods for future delivery." The fact that, in the sale order, under the item of 100 cases of No. 2 tomatoes, occurred the words, "to be shipped in four installments," would not make the con-

[illegible] [illegible] [illegible] [

tract such an installment contract, that it must be considered as a series of contracts, but merely showed that the merchandise which had been ordered was itself to be shipped in four installments. Of the order of 100 cases of No. 2 canned tomatoes, 65 cases were delivered on November 7, 1916. Upon delivery the price was due. Admittedly it was not only not paid upon delivery but has not yet been paid. Plaintiff claimed and we think justly, that as the canned goods which were delivered, being two cases of peas, ten cases of corn and 65 cases of tomatoes, were not paid for when delivered or before suit, it had the right to refuse to deliver the balance of the order. The defendant claims that the plaintiff was not excused by his failure to pay for what had already been delivered. We, however, cannot agree with that conclusion. As soon as the cases of corn, peas and the sixty-five cases of tomatoes were delivered the defendant became a debtor to the amount of their cost. It is true that the plaintiff's invoice of November 7, 1916, stated "positively no discount after ten days", but that does not import that at that time the money was not due. There is no evidence of any custom as to a period of suspension of liability. The fact that the price of tomatoes may have gone up or that the plaintiff was selling the defendant other merchandise or that Weber said he would send out some more tomatoes with the next shipment, is entirely immaterial and irrelevant. The plaintiff is entitled to rely upon the law that, as the defendant failed to pay for the goods that had been delivered, he would not be allowed damages for a failure on the part of the plaintiff to deliver the balance of the order.

(2) As to the evidence which, it is claimed by the plaintiff, was erroneously ruled out by the trial court: The plaintiff in his answer to the defendant's claim of set-off

set up that the defendant was buying under a $300.00 guaranty signed by his mother and "that his account had far exceeded the credit limit, and was not in such a condition as to warrant any further extension of credit, and that for said reason no pro rata delivery was made on the unaccepted order for 50 cases of No. 3 canned tomatoes."

On cross examination the defendant was asked if it was not a fact that he was buying from plaintiff under a guaranty signed by his mother, Mary Walenga, to which question an objection was made and sustained by the court. Inasmuch as the bill of exceptions, which contained the foregoing, reproduces the testimony merely in narative form, it is difficult to determine exactly what transpired. However, as the question, just set forth, was asked upon cross examination, it was obviously improper as the subject had not been touched upon in the direct examination and the record does not show that the plaintiff had called the witness as his own. The same reason applies to further questions which were propounded by counsel for the plaintiff to the defendant. The defendant on cross examination was asked further, whether at the time he was seeking further tomatoes in the summer of 1916 his account did not exceed $300.00; and whether his account in December, 1916, did not amount to the sum of $365.10; and whether it was not a fact that when he opened up his account with Henry Horner & Co. he came down to its office with his mother and made arrangements for a line of credit up to $300.00 by his mother giving Henry Horner & Co. a guaranty for an amount not to exceed $300.00; and whether on April 10, 1917, he owed the plaintiff the sum of $309.46. All those questions were objectionable on cross examination. But, upon the trial judge sustaining objections to those questions counsel for the plaintiff stated to the court, "that he understood the court had refused to

permit any evidence as to the defendant doing business under a $300.00 guaranty or the condition of his account or his financial standing"; and thereupon offered to show that defendant was buying from plaintiff under a $300.00 guaranty; that his account during the months of November and December, 1916, as for some time thereafter, was in excess of $300.00; that he was working under a guaranty signed by his mother, Mary Walenga, for a sum not exceeding $300.00; that the financial condition of said Frank Walenga, during November and December, 1916, and for some time thereafter, was not in such condition as to warrant any further shipment of goods to him. When Mary Walenga was on the stand, and at the close of the cross examination, counsel for the plaintiff asked that she be made the plaintiff's witness for the purpose of asking her whether she had not been down to the office of Henry Horner & Co. with her son when he first opened up his account and if at that time she had not signed a guaranty for her son for an amount not exceeding $300.00. The court, however, sustained an objection, and, further, refused the proffer on behalf of counsel for the plaintiff to show the witness the guaranty of $300.00, which was signed by herself on account of the defendant.

Counsel for plaintiff also undertook when the plaintiff's witness, Streich, was on the stand, to question him concerning whether the defendant was buying goods of the plaintiff under a guaranty of $300.00 signed by his mother and whether or not the account of the defendant was in such a condition as to justify any further shipment of goods and merchandise, all of which was objected to and ruled out.

Further, counsel for the plaintiff offered to show that during the months of November and December, 1916, the defendant's account was considerably in excess of $300.00; that

the defendant was buying from the plaintiff under a guaranty of $300.00; that his credit, standing and rating did not justify any further extension of credit; that the defendant was unable to pay his past due account; that he was making only small monthly payments and was insolvent. Upon objection, however, the proffer was refused. Counsel for the plaintiff asked the court if he was to understand that no testimony would be permitted as to the financial condition of said Frank Walenga and the court answered, "no I will not, it has nothing to do with this case."

Inasmuch, as the plaintiff in its answer to the defendant's set-off, set up, (1) the matter of a guaranty; (2) that the defendant's account far exceeded the credit limit; (3) that it was not in a condition to warrant any further extension of credit; and as the plaintiff offered to show "that defendant's account was considerably in excess of $300.00 during the months of November and December, 1916; that said defendant was buying of the plaintiff under a guaranty of $300.00, said guaranty being signed by Mary Walenga in the presence of the witness; that his credit, standing and rating did not justify a further extension of credit; that said defendant was unable to pay his past due account and was making only small monthly payments and was insolvent," all of which proffer of evidence was refused by the trial court; we are of the opinion that the court erred and that there should be a new trial.

Upon what theory the trial judge remitted $100.00 from the verdict we are unable to ascertain. From the record it is difficult to tell just what was due for the merchandise which had been delivered upon the order when the plaintiff

הנה מאמר דומה לזה לרבי אליעזר אומר: "אם לא יעמוד אדם
לפני המלכים, אינו ראוי לעמוד לפני חכמים". הרי לנו דוגמא
נוספת לכך שהמלכות אינה אלא הדרגה ראשונה בסולם הרוחני
ולא מטרה בפני עצמה. כל מי שמגיע לדרגה הרוחנית הגבוהה
ביותר, הוא בעל-הבית ואין מלכות. המאמר הנ"ל הוא בעל-ערך
מלבד הערך הרוחני גם מבחינה אחרת. הוא מגלה לנו שהיחס
בין המלכות לחכמים לא היה תמיד כפי שהיה אחר כך, אלא לפני
המלחמה עם בני אדום הוא הרגיש, "אי אפשר שלא יהיה, אם לא
יבא מי שיהיה חכם ומלך".

לפיכך, אם כל הנ"ל הוא נכון, אם אמנם לא הוא
מלחמת-עולם אחרונה, אם כן, לפי מה מדברים על "מלחמת
לבנון" ואת כל הפוליטיקה הנוגעת לכל מבוכאים זה כמעט
לגמרי? הרי כולנו לא נוכל לא לראות לא מבחינה לא מבחינה
הגיונית אינטרס מכריע מדי מכל, כל מה שלא מתבטא בכל
הפרשה מלחמתית מה שמדבר על הרשעים הם הנוכחים, בלתי
אפשרי לא לראות שהרשעים הם מעלים על הרשעים הנוכחים ובלתי
אפשרי לא לדבר, אבל בכל-זאת, אמנם בכל-זאת יש מדבר
לבנון אינו אלא הדרגה ראשונה בסולם הרוחני ולא מטרה
בפני עצמה. כל מי שמגיע לדרגה הרוחנית הגבוהה ביותר,
הוא בעל-הבית ואין מלכות. המאמר הנ"ל הוא בעל-ערך
מלבד הערך הרוחני גם מבחינה אחרת. הוא מגלה לנו שהיחס
בין המלכות לחכמים לא היה תמיד כפי שהיה אחר כך, אלא לפני
המלחמה עם בני אדום הוא הרגיש, "אי אפשר שלא יהיה, אם לא
יבא מי שיהיה חכם ומלך". הרי לנו דוגמא נוספת לכך שהמלכות
אינה אלא הדרגה ראשונה בסולם הרוחני ולא מטרה בפני עצמה.

refused to make further deliveries. Under the circumstances, and owing to the errors suggested, and particularly the ruling out of competent evidence, we are of the opinion that there should be a new trial.

REVERSED AND REMANDED.

152 - 24498

JOHN M. McCLUN,

Appellee,

vs.

JOHN RADU,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 671

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 21, 1918, a judgment by confession in the sum of $260.60 was entered in favor of the plaintiff against the defendant. On April 4, 1918, the court ordered that the judgment be opened and leave given the defendant to defend and that the judgment stand as security. The cause was then tried without a jury and on May 1, 1918, confirmed the former judgment.

The evidence shows substantially the following: On February 28, 1918, at about 6:00 o'clock P.M. the defendant, John Radu, having seen an advertisement that a certain three flat building was for sale, went to the office of the plaintiff at 218 Sixty-third street, and made some inquiries about the property. He had some conversation with one Kaiser who was a real estate salesman employed by the plaintiff. He was given the address of the building in order that he might look at it the next day. The next morning the defendant's wife went over the building with Kaiser. It was a three story, stone front building containing three flats and a basement. There was some discussion

concerning the expiration of the leases and she was told by Kaiser that inasmuch as the building was in need of repair it might be that some concession might be made on the price of $8,500.00. In the afternoon, somewhere in the vicinity of four o'clock, of March 1, 1918, the defendant and Kaiser went out to see the property. Kaiser then went over to see the owner, Chadwick, who he said was ill in bed, and the defendant went over the property. The defendant testified that he found that two of the tenants had moved out and that the building needed repair and cleaning. That shortly afterwards they met at Kaiser's office. Kaiser testified that they, defendant and his wife, asked that something more ought to be taken off the price of $8,500.00 on account of the needed repairs; that accordingly he telephoned to Chadwick, the owner. The defendant testified that he told Kaiser that he wanted to see his lawyer about the contract but that Kaiser intimated that that was unnecessary; that that was not the contract; that he, Kaiser, would have to see the owner first; that he was ill in bed; that he did not know whether the owner would accept the price. The defendant was asked to make a deposit and told Kaiser that he only had $10.00 with him. The defendant then paid that amount to Kaiser and signed the note in question for $240.00, making a deposit of $250.00 on the purchase in question. The note was made payable to the order of the plaintiff and was due the next day, March 2, 1918. Mary Hadu, the wife of the defendant, testified that she saw Kaiser about nine o'clock the next morning (Saturday) and told him that the building needed a great deal of repairs; that she did not think they could take the building; that he told her that he had not seen the owner; that he was waiting until he could get the $250.00; that she should call him up

Monday night; that he had not yet seen the owner. The evidence of Chadwick, the owner, is to the effect that Kaiser called to see him about the property on Friday, March 1, 1918; that he was ill in bed at that time; that he said he would accept $8,200.00 for the property; that he signed the contract in question on the day it bears date, March 1, 1918. The testimony of Kaiser concerning the time when Chadwick signed the contract is ambiguous. On cross examination of Kaiser the following colloquy occurred:

> "Q Isn't it a fact that he signed the contract on Saturday after Mrs. Radu said that she wouldn't take it?
>
> "A They never said they wouldn't take it; she says if you can get those leases renewed we will be glad to go ahead with the deal.
>
> "Q Didn't you say at that time that maybe the owner will make some concessions, that'I haven't seen the owner yet'?
>
> "A Absolutely not.
>
> "Q The contract was written but not signed?
>
> "A It was signed by Mr. Radu at that time and I told him at that time that the owner was sick in bed and didn't want me to come over until noon the next day to sign the contract as he was sick in bed.
>
> "Q That was noon of the next day, Friday? A Yes.
>
> "Q It was not on Saturday, that is after Mr. Radu was there on Saturday morning? A. Yes, sir, that is correct."

It is the contention of the defendant that the offer to purchase was revoked before it was accepted on behalf of Chadwick, the owner. The evidence, however, by no means justifies the conclusion that there was a revocation. The evidence on behalf of the plaintiff in regard to what took place on Saturday morning in regard to a revocation is very vague and uncertain. Further, it is the definite testi-

Sunday morning; since he had only just been his master. The relations of Gamelinck, the master, is in his office that Jacobus Molina he was now about the quarrels on Friday; March 3, 1832; that he was all in bed at that time; that he only in order around 8,00.00 for the principal; that he always [illegible] in quarrels in his for it happy day, March 3, 1832. The latter very at length mentioned the time when Gamelinck helped the servants in quarrels. He gives descriptions of Jacobus the following effects answers:

"Q. Didn't it a time when he caused the servants to quarrel on Saturday after 3?

"A. They never said that anything's wrong if the door if it was not open since Jacobus knocked or will be kept in or shake also the door.

"Q. Didn't you not hear the last time when Jacobus the door will open when knocked, doesn't hurry's also the door 3?

"A. Definitely not.

"Q. Was Jacobus also existing for the quarrel

"A. It was clipped for his being of that time and I kick him at that time when the door was open, he was not about the door. Jacobus's room and the door 3 in the same direction as he was not alive in 3.

"Q. Does you know of the same day, Friday? A. Yes.

"Q. At one not in Gamelinck, that is alive in, Does you know Jacobus's [illegible]? A. Yes, not, that he [illegible]."

It is the testimony of the defendant that the [illegible] is [illegible] his [illegible] is not charged in the hall of Gamelinck, the master. The witness, however, by no means justifies the [illegible] that there was a disturbance. The witness is ignorant of the [illegible] in [illegible] to [illegible] that quarrel in a restaurant is very common in [illegible]. Therefore, it is the [illegible]

mony of Chadwick, that the contract in question was signed by him on Friday, and as the trial judge believed that to be a fact then unquestionably under the circumstances of the case there could be no revocation by any acts on the part of the defendant on the following morning. It is true that the testimony of Kaiser as to the time when it was signed is somewhat confused and ambiguous but as the witnesses appeared before the trial judge and he was in a much better position to determine the character of the evidence given than we are we do not feel justified in reaching a conclusion contrary to his determination.

It is contended that the note in question was without consideration as it was payable to McClun, a real estate broker, and not to Chadwick, the owner. There was no legal objection to having the note made payable to the plaintiff even though he were at the time the agent of Chadwick. Also, the agent had the right to sue in his own name. The defendant has no ground for complaint. He executed the note and made it payable to the plaintiff. All he is interested in, as far as the question of parties is concerned, is that he shall not be compelled to pay twice. It is the law that the agent had the right to sue, but does so as a trustee for his principal; and a payment to the plaintiff becomes a payment to the principal. 2 Mechem on Agency, Secs. 2030 and 2034. Equitable Trust Co. v. Harder, 177 Ill. App. 106. That the defendant is an illiterate Roumanian and unable to express himself well or to exercise prudence in his affairs is to be regretted; but in the matter before us we are in duty bound simply to apply certain well known principles of law.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

154 ✓ 24500

OLIVER W. PITTS,

Appellee,

vs.

JOHN H. SHATFORD and
C. H. SAWYER,

Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2141 I.A. 671

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 16, 1918, the plaintiff brought suit in the municipal court against the defendant on a promissory note for the sum of $1,000.00 dated November 20, 1917, payable to the order of the plaintiff on November 30, 1917, and signed by the defendants. On March 26, 1918, defendants filed an affidavit of merits which was on April 8, 1918, stricken from the files and the defendants given leave to file another in five days. On April 10, 1918, defendants filed an amended affidavit of merits which was, on April 17, 1918, stricken from the files. In the order of April 17, 1918, the plaintiff was ordered xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx "to file security for costs within five days." On April 22, 1918, the following order was entered: "Now comes the plaintiff in this cause and moves the court to vacate order to file security for costs and the court being fully advised in the premises overrules said motion." On the same day the defendants filed a further amended affidavit of merits. On April 23, 1918, the plaintiff filed a bond for costs. On April 25, 1918, the following order was entered:

"Now comes the defendant in this cause and moves the court to dismiss for failure of plaintiff to file security for costs and the court being fully advised in the premises overrules said motion." On April 30, 1918, on motion of the plaintiff the court struck the last amended affidavit of merits from the files, and the defendants electing to stand upon their amended affidavit of merits, judgment was entered against them in favor of the plaintiff in the sum of $1025.00.

There is a bill of exceptions which purports to set forth a colloquy between the trial judge and counsel for the plaintiff and defendants concerning the filing of the cost bond. Therein it appears, upon statement of counsel, that a motion was made that the suit be dismissed on account of the failure of the plaintiff to file a cost bond within the time granted by the court.

The amended affidavit of merits which the trial judge was of the opinion did not set up a good defense is as follows:

> "Prior to the making of the note herein sued on, the plaintiff Fitts was the holder of 100 shares of stock in the New Process Refining Company, an Illinois corporation, hereinafter referred to as the Company, and said Company was then and there indebted to its creditors in an amount largely exceeding the total amount of its assets, and the liquidation or reorganization of said Company had become necessary; and said plaintiff Fitts and the other stockholders of said Company agreed with each other and said Company and with defendants upon a voluntary reorganization by which plaintiff Fitts and the other stockholders surrendered to said Company one-fifth of their shares of stock which they held in said Company as a provision and means for the Company to sell the same and thereby raise the funds necessary to defray its said indebtedness, and further agreed that a general and complete audit of said company's affairs should be had and in case the same should show that, in order to pay off said Company's indebtedness, additional funds should be necessary, said plaintiff Fitts and said former

stockholders each agreed to pay into the said Company in cash or stocks for sale to purchasers of said stock from the said Company, his pro rata share of such additional indebtedness, and it was agreed by said Fitts and former stockholders that the balance of their stock was to have a lien thereon for said additional indebtedness should it be shown on the said audit that there was such indebtedness, and defendants and their associates agreed to buy from said Company the shares of stock surrendered hereinunder and pay said Company in cash therefor and thereby provide said Company with funds necessary for it to pay off its said indebtedness, which was done accordingly and as a part of said transaction and agreement plaintiff Fitts surrendered to said Company one-fifth of his shares of stock and agreed to sell his remaining shares of stock to defendants for certain promissory notes, whereof the note herein sued on is one for a total face value of $4,000.00 and said plaintiff Fitts warranted and agreed with said defendants that should it be found that such additional indebtedness existed, that the pro rata share thereof should be paid by said Fitts and that said Fitts would satisfy the aforesaid lien on his stock and thus permit said stock, to be transferred to defendants free and clear from all claims, liens and incumbrances, and on said general and complete audit being duly had, it was found thereby that such additional indebtedness of said Company did in fact exist and the pro rata share to be so borne by said plaintiff Fitts was, towit, the sum of One Thousand Dollars, which is the amount herein sued on and said plaintiff Fitts has not paid his pro rata additional share of $1,000 and stock given by said plaintiff to defendants for note herein sued on is of no value whatever and because of said agreement nothing is due said Fitts on said note and said note should be surrendered and cancelled.

And for a further defense said plaintiff represented and warranted, and said defendants relied thereon that said plaintiff had, while owner of stock in said company, invested sums of money to a total of $10,000 in said Company, whereas and in fact said plaintiff had invested not to exceed $2,000 in said Company, and said difference of $8,000 which said plaintiff had warranted that he had paid in to said Company was not paid by any other person or persons and thereby said Company's assets were $8,000 less than represented and warranted by said plaintiff, unknown to defendant, at the time of the execution of the note herein sued on.

Defendants are not indebted to plaintiff in the sum sued on or any other sum whatever."

The plaintiff is charged with entering into an agreement with the New Process Refining Company by which he was bound to surrender one-fifth of the stock which he held, that stock to be surrendered so as to raise funds

to pay the debts of the company, and, further, that if upon an audit it was shown that more funds were necessary the plaintiff promised to turn into the company cash or stocks for sale for his pro rata share of such additional indebtedness, for which the plaintiff was to have a lien for the benefit of the balance of his stock.

The defendants and their associates agreed to buy from the company the shares of stock which were surrendered and pay the company in cash therefor so as to put the company in funds. It is stated that that was done, and as a part of the transaction an agreement made that plaintiff surrender to the company one-fifth of his stock and agree to sell the balance to defendants for promissory notes of the face value of $4,000. The plaintiff agreed with the defendants, it is claimed, that if it should be found that additional indebtedness existed the plaintiff would pay his pro rata share and thus satisfy the lien on his stock and permit it to be transferred to the defendants free from all claims; further, that an audit was made and it was found that an additional indebtedness of the company existed; that the pro rata share of that to be borne by the plaintiff was $1,000.00 which is the amount here sued for. The plaintiff has not paid that amount, which was his additional share. It is claimed that his stock, which he gave to the defendants, and the notes sued upon are of no value and that the notes should be surrendered and cancelled.

The second part of the amended affidavit of merits sets up that the defendants relied upon a certain warranty and certain representations made by the plaintiff which were false. The phraseology of the affidavit of merits is not

simple; it is ambiguous and very much involved. However, after a careful analysis, we are of the opinion that the defendant should have been allowed to put in evidence of his claim and that the pleading should not have been stricken. It may be that when the evidence, as to the agreement of reorganization, is put in that it will be found that there is no liability.

Further, it is contended by the defendant that the plaintiff failed to file, within the time prescribed by the court, a bond for costs. Chapter 33, Sec. 1, Hurd's Rev. Stat. 1917. Inasmuch, however, as a bond for costs was actually filed, and as the record shows that on April 25, 1918, subsequent to the filing of the bond for costs, the defendant moved the court to dismiss the cause for failure of plaintiff to file security for costs, and the court, reciting that it was "fully advised in the premises" overruled the motion, we are of the opinion that the defendant's contention is untenable.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]

[illegible]

[illegible]

212 - 24561

JOSEPH T. DELFOSSE,

Appellee,

vs.

WILLIAM E. HUNTER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

214 I.A. 671 3

MR. JUSTICE TAYLOR delivered the opinion of the court.

On February 16, 1918, the plaintiff began suit in the Municipal court against the defendant, W. E. Hunter, and on the same day filed a statement of claim, stating inter alia, that his claim was for the recovery of certain money due on a certain promissory note. The promissory note is described as dated October 12, 1917, for the sum of $1150.50, payable four months after date to the order of Joseph T. Delfosse, 20 West Lake Street, Chicago, with interest at 6% per annum, and signed W. E. Hunter. On March 11, 1918, the defendant filed an amended affidavit of merits which is as follows:

> "On April 8, 1915, this defendant gave a note for the sum of $1,000.00 to the Iris Theatre Company, being the purchase price of ten shares of stock in said Company; that the consideration of said note failed by reason of the fact that the said stock was never delivered to this defendant in pursuance to said sale.
>
> This defendant further says that the said stock was sold to him on the condition that the purchase money should be used, together with other money, to retire the first and second mortgages against the real estate owned by said corporation and that after this had been done, a Bond Issue was to be floated and each stock holder, including this defendant, was to receive bonds in the sum of 60% of the stock held by them.

This defendant states that said conditions were misrepresentations and that there were other misrepresentations made; that the said money was not used for said purpose; that said note matured fifteen months after date, at which time it was held by the plaintiff in this case; that the plaintiff, at the time said original note was transferred to him, knew all of said conditions and misrepresentations and failure of consideration; that the note sued upon in this case was given as a renewal of said former note and given subject to all the defenses that existed to said prior note.

That the plaintiff did not pay any consideration for said note."

On April 23, 1918, defendant filed an additional affidavit of merits stating that the plaintiff was not a bona fide holder for value of the note sued upon; that he paid no consideration for the original note dated April 8, 1915, "but received the same from one Scott in payment of an alleged indebtedness of said Scott and said note was not duly endorsed to the plaintiff and plaintiff had notice of the infirmities of said note." On May 6, 1918, the cause was tried before a jury and pursuant to an instruction by the court they brought in a verdict finding the issues against the plaintiff. On May 28, 1918, a new trial was granted and on June 15, 1918, the cause was again tried before a jury. Counsel for the plaintiff offered in evidence the promissory note in question and then rested.

On behalf of the defendant three witnesses were called, Hunter, Bienemier and Delfosse. The evidence of Hunter is to the effect that in April 1915, he had a conversation with one F. G. Scott; that the latter said he was conducting the Iris Theatre Co.; that he desired to bond the company so as to pay off the first mortgage and that in order to do so if he, Hunter, would become interested, he would take his note; that Delfosse "would help him out by way of buying that note or advancing

money or something of that sort"; that he told Scott to talk the matter over with Biesemier; that later Biesemier presented him with a written report diagnosing the Scott proposition; that a few days later he saw Scott and told him that he would go into the proposition; that Scott then handed him a note and he signed it. The note was for $1,000.00, dated April 3, 1915 and payable to the order of the Iris Theatre Co. It recited inter alia, that there was deposited with the Iris Theatre Co. certificate No. 50, being ten shares of Iris Theatre Co. stock, as collateral security. The note also provided that the collateral might be sold at the discretion of the legal owner whenever the securities in the opinion of the legal owner depreciated in value. Written across the face of the note, when it was offered in evidence, were the words "Paid by renewal note including interest $1150.50, J. T. Delfosse" and at the bottom "W. E. Hunter, 20 West Lake Street, Chicago." On the back of the note there was written by the Iris Theatre Co., a guaranty of payment at maturity. Hunter further testified that subsequently Scott told him that the money had not been used to take up the mortgages; that no new bond issue was ever made and that no stock was ever delivered to him; that Scott had the original note in his possession; that they asked him, the witness, to renew it; that the first time that he learned Delfosse claimed to own the renewal note was when he brought suit; that he knew when he gave the first note for $1,000.00 that Delfosse was interested with Scott and was advancing money on the notes he was turning over to him"; that "he knew somebody was going to buy these notes"; that Scott told him he wanted the note to raise money; that he knew Scott wanted it in order to get money on; that subsequent-

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ly Delfosse made a demand on him; that when he gave the renewal note in October 1917, he knew that Scott had not done what he promised to do; that he knew the note would get into the hands of third persons because Scott told him that Delfosse was buying the paper and advancing money.

The evidence of Biessenier is to the effect that in April 1915, he had a conversation with Scott as the result of Hunter stating that he desired him to take it down and analyze it and report on it; that subsequently he had several conversations with Scott in which Scott stated that he had not retired the mortgage nor sold the stock.

The evidence of Delfosse is to the effect that he is in the wholesale and retail drug business and is a licensed commercial broker; that he has bought from time to time a large number of notes from Scott; that the Iris Theatre Company owes him in the neighborhood of $20,000.

At the close of the evidence the court instructed the jury to render a verdict for the plaintiff. That was done; and judgment then entered thereon in the sum of $1195.12.

The original note was dated April 3, 1915, payable to the order of the Iris Theatre Co. fifteen months after date and was signed by the defendant. It was given by the defendant to one Scott, and according to the testimony of the defendant himself, with the knowledge that it would be negotiated. His testimony is that Scott told him at the time that Delfosse, the plaintiff, would buy the note or advance money upon it. Subsequently, on October 12, 1917, the defendant executed a renewal note in the sum of $1150.00, payable to the order of the plaintiff and there was then endorsed upon the original

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note "Paid by renewal note, including interest, $1150.50 J. T. Delfosse" and below "W. E. Hunter, 20 West Lake Street, Chicago". The renewal note dated October 12, 1917 is the one upon which this suit was brought. It seems to be the contention of counsel for the defendant that the original note was given on condition that the proceeds were to be used by Scott for the theatre company to retire certain incumbrances upon the theatre property and that when it was given Scott represented that a new bond issue was to be floated and, in part at least, distributed as a bonus to purchasers of the stock, and that as these conditions were not carried out there is no liability on the note. Further, it seems to be contended that the evidence of the defendant established a defective title in the original payee and that as a result the plaintiff was bound to show that he was "a bona fide holder in good faith." Where, however, as here, the original note was given, with the understanding that it might be negotiated, and subsequently it was negotiated, and was then taken up and followed by a renewal note given to and made payable to the plaintiff, without any substantial evidence going to show that the plaintiff did not take the note in suit in good faith and for full value, the defenses claimed by the defendant must fail. It is the law that one who takes a promissory note as endorsee before maturity and for a valuable consideration in good faith and without notice of any defects is secure and entitled to recover thereon. And, as said by the court in Bradwell v. Pryor, 221 Ill.602, "mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part at the time of the transfer, will not defeat his title." From the evidence we are of the opinion

that the plaintiff became a holder of the renewal note in due course according to the definition expressed in Secs. 51 and 52 of Chap. 98, on Negotiable Instruments. According to Sec. 56 of the foregoing statute in order for the plaintiff to be bound by notice of defect it must be shown that he has actual "knowledge of such facts that his action in taking the instrument amounted to bad faith." Not only is there no such evidence in the record, here, but the testimony of the defendant alone is sufficient to show that a defect did not exist. The defendant himself testified that at the time he gave the renewal note he knew that the proceeds of the note had not been used to take up the mortgages and that no new bond issue was ever made and no stock delivered to him; that he knew that Scott had not done what he promised to do. Counsel for the defendant claimed that the fact that the plaintiff was intimate with Scott and was connected with the theatre, and that Scott had possession of the original note at the time it was due and that he, the plaintiff, failed to make any inquiries about the note, are evidence of bad faith. The evidence on those subjects, however, do not justify that conclusion.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

that the principle beneath a belief in the material world is the ancient assumption in the philosophical conversion in Plato, in and of time, 93, in Aristotle's Metaphysics, according to Ong. In of the developing structure in which the principle is to be found by origins of ancient is such to change that in his lecture "Psychology of Jesus Christ has his method in having the instrument discovered to the Holy." Not only is there no work existing in the primary point, but the beginnings of the difficulties which is water that a lecture its own reality. The Aristotelian Summit revelations that at the time he gave the previous work to Jesus Christ the work of the world but was first based in Spain on the interpretations and that in the Medieval times, this work was to change the lineage to take that he first that Aristotle Aquinas was produced to us. Through the Jesuit Aristotelian which the fact that the principle was influence with Jesuit and was accepted into the Jesuits, and then there had interpretations of the original work of the time in the Jesuit Aristotelian which was the principle, Jesuits in Jesus Christ and the relations of the Jesuits. The relations on Jesus Christ, however, in the Jesuits that questions.

Finding an order in the world the Jesuits in Jesus Christ.

- 25326

CAROLINE A. DYCKMAN, CAROLINE B. ROBINSON and LILLIAN C. B. MILLER, as trustee under the last will and testament of FREDERICK W. BIPPER, Deceased,

Appellants,

vs.

MATHIAS L. RAFTREE et al,

MATHIAS L. RAFTREE,

Appellee.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.

214 I.A. 671

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an interlocutory appeal from an order granting an injunction pursuant to the prayer of a cross-bill filed by the appellee, Mathias L. Raftree, in a foreclosure suit brought by the appellants.

The appellants as trustees of the Bipper estate alleged in their original bill that the appellee Raftree was indebted to them in the sum of $17,000 and that they held as collateral for his indebtedness certain mortgage notes aggregating $17,000, secured by a trust deed covering property owned by Raftree and this collateral the trustees sought to foreclose. In taking title Raftree had not assumed and agreed to pay the incumbrance referred to but the trustees alleged in their original bill that he had signed a statement in writing admitting the existence of the incumbrance as a valid lien against his property and promising personally to pay it.

The appellee Raftree filed his answer to the original

[illegible]

[illegible]

[illegible]

bill in which he denied the existence of a personal indebtedness to the trustees of the Bipper estate in the sum of $17,000, as alleged by them in their bill, and denied further that he had ever admitted that the mortgage notes in question were a valid lien against his property or that he had ever personally promised to pay the mortgage notes, and pleaded the Statute of Limitations to those notes.

The appellee Raftree also filed his cross-bill setting up that from some time in 1900 down to the year 1917 he had frequently been employed by the complainants as attorney for the Bipper estate; that in December 1901 he borrowed $10,000 from the complainants, for which he gave his note and a trust deed on property other than that covered by the incumbrance involved in the original bill; that in May 1903 he bought the property covered by the incumbrance involved in the original bill which the complainants are seeking to foreclose and that he is still the owner thereof. He further alleged in his cross-bill that during the years of his employment referred to, there existed a mutual understanding between the trustees and himself that the indebtedness of one should go in liquidation of the indebtedness of the other and that he would be entitled to be credited on his debts to them for his services and disbursements for them and that because of this mutual understanding he has never rendered bills for his services and the trustees have never paid anything for his services, and he, on the other hand, has paid nothing on account of either interest or principal on his said indebtedness to them. He further alleges that although the trustees have become and are indebted to him in the sum of upwards of $60,000 for services rendered and moneys paid out for them while acting as their attorney, they have declined to give him credit therefor or to come to an accounting with him in respect to the same, and the cross-complainant asks

that an account be taken of the alleged indebtedness of the trustees to him, and that when said indebtedness is determined it may be set off against any indebtedness which the trustees may have against him, and that he may be given a decree for any balance found in his favor. The appellee further alleges in his cross-bill that since the filing of the original bill the complainants, in the name of the trustee nominated in the trust deed given to secure the notes sought to be foreclosed, have brought a suit in ejectment in the Circuit Court against the appellee Raftree and his tenants in possession of the premises sought to be foreclosed and that under this action they have demanded immediate possession of the premises and have notified the tenants to pay their rent to the attorneys for the said complainants, and the appellee asks for a writ of injunction, restraining said complainants from further prosecution of said ejectment suit, pending the hearing of this case and the determination of the rights of the respective parties.

Upon the filing of this cross-bill an order was entered, providing for the issuing of the injunction as prayed for, from which order this appeal has been perfected.

The appellee Raftree has made a motion in this court for the dismissal of the appeal on the ground that the complainants did not give him the five day notice required by the statutes, of the filing of their praecipe for a record and contending that the portion of the record called for by the praecipe and filed by complainants is not sufficient to enable this court to determine the matters raised on this appeal. This motion was reserved to the hearing. At the time appellee made said motion he made another motion, suggesting a diminution of the record and asking leave to file a supplemental record, instanter, supplying

(b) an answer by voice of the aliens interchanges or the
interface is use, and that voice mode interchanges is recognized
it may be not all against any interchanges which the interface
may have against him, and this by not to place a barrier for
any violence found in his lower. The opposite further allegat
in his moves will have since the filing of two original bill
the complainants, in the name of the brother resistance in the
tower and plans to cause the bases sought to be terminated,
have brought a suit in ejectment in the Circuit Court against
the appellee defiance and for damage in possession of the
premises which is he trespassed and that under this action
they have demanded monetary possession of the premises and
have carried the trouble in any bases and to the attorneys
for the main complainants, and the appellee made for a sale
of indemnity, protecting said complainants from further
prosecution of such statement suit, pending the hearing of
this case and the determination of the rights of the respective
parties.

Upon the filing of this cross-bill an order was entered
granting the leaving of the injunction as prayed for. From
which order this appeal has been perfected.

The appellee defiance has made a motion in this court
for the dismissal of the appeal on the ground that the complain-
ants did not give the bond required in the order granting
of the filing of their pleading for a period and providing that
the pending of the cross bill shall be by the pleading and filed by
complainants in not sufficient to enable this court to deter-
mine the matters raised in the appeal. This motion was reserved
to the hearing. At the time appellee made such motion he made
another motion, suggesting a diminution of the record and asking
leave to file a supplemental record, substituting "a

the parts of the record which he contended should have been included in complainants praecipe and in the record filed by them. This latter motion was allowed and a supplemental record was filed and the parts of the record which appellee contends should be before us on this appeal are now here, and therefore appellees motion to dismiss the appeal on the ground referred to is denied.

In support of their appeal complainants contend that the order for an injunction was erroneous in that it specified no time within which the injunction bond should be filed. The record shows that when this appeal was perfected the injunction bond had been filed and duly approved by order of court and the injunction writ had issued, and, therefore, this point becomes immaterial. Until these things were done the order in question was not appealable. Lichstern v. Rosenheim, Grain Co., 176 Ill. App. 250.

On appeal from this interlocutory order the complainants may raise any question that could have been raised against the cross-bill by demurrer or by motion to strike. O'Beirne v. Elgin, 187 Ill. App. 581. Complainants contend that the cross-bill is fatally defective and insufficient as a basis for the injunction order appealed from, in that it is too vague and general in its allegations and does not allege sufficient facts to support appellees alleged claim; that it proceeds by way of recital only and not by positive averment; and also in that it does not offer to do equity. The cross-bill might well have contained more direct averments than it does, but taking it as it is we are of the opinion that it is not fatally defective on thegrounds above referred to. It contains sufficient allegations to establish appellee's right to an account. It

the parts of the tension which is maintained should have been violated in unexplainable generality and in the recent film by Lean. This latter action was followed not a substantial re-work was film and the parts of the recent which appeals certainly should be before us on this record are not here, we conversion appellate matters to classify the appeal as the ground referred to in evidence.

In support of their proposed constitutional contend that the court for an injunction was erroneous in that it appellies on time which the information bond should be filed. The record shows that some time expired was permitted the injunction bond but been filed not duly approved by member of other per the injunction with the bond,and,therefore, this point becomes immaterial. Still other things have also the order in question was not appealable. Hagerty v. Sacramento, supra (p.. 372 Ill. App. 666.

We agree that the claim intentionally error the complainants may prove any question that would have been raised against the cross-bill by demurrer or by motion to strike. Hagerty v. Hagerty, 327 Ill. App. 667. Complainants contend that the cross-bill's Family Exclusive was filed in a basis for the injunction order appealed from, in that it is too vague and general in its allegations and does not allege sufficient facts to support appellees bill alone; that it proceeds by way of formal only but not by positive statement; and also in that it does not offer to do equity. The cross-bill might well have sustained were fairly susceptible than it does, but having it as it is we are of the opinion that it is not fatally defective on demurrer where challenged so. It sufficiently sufficient allegations to establish appellee's right to an accounting. It

discloses the relation of the parties and contains a general statement of the matters pertaining to which the appellee seeks his account, which is sufficient. The items of the account need not be pleaded. 1 Cyc. 436. It is true, as appellants allege, that a bill for an accounting need not contain an express offer to do equity or pay any balance, found against the pleader, but that if the accounting prayed for is incidental to other relief primarily sought, and the offer to do equity is prerequisite to obtain such relief, the bill will not be sustained as a bill for an accounting and in the basence of such offer. 1 Cyc. 438; 1 C.J. 636. We are of the opinion, however, that in the case of the cross-bill involved here, the law will imply an offer on the part of the pleader, to do equity. The accounting is not merely incidental to other relief sought but is one of the primary objects of the cross-bill.

Appellants contend that no injunction should have been granted because of the inconsistency between the cross-bill and the answer. They argue that by his answer, appellee Raftree denies every alleged circumstance that would take their case out of the Statute of Limitations and pleads the statute, and that if his answer is taken as true they could not maintain their suit; whereas by his cross-bill he alleges a rendition of services, and making of disbursements for appellants, within the period of the statute, under a mutual understanding with them for an application of the amounts so earned and expended, as credits on the mortgage debt, so that under the allegations of the cross-bill, appellants claim would not be barred by the statute. A proper analysis of the answer and the cross-bill, however, does not support this contention. In both his cross-bill and his answer appellee Raftree refers to an indebtedness,

distinguish the relations of the parties and establish a general statement of the matters particularly in which the application made his complaint, which is sufficient. The issue is the constitutionality of the statute. 2 Cyc. 44a. In its form, an application alleges, that a bill for an accounting based upon certain an express offer to do equity on the defendant, these against the plaintiff, but since if the accounting prayed for is instituted to assess actual pecuniary damage, and the effort is to compel by preventative to obtain such relief, the bill will not be sustained on a bill for an accounting and to the benefit of such effect. 2 Cyc. 1.c. 44a. In case of the equities, however, that is the case of the cross-bill involves here, the law will imply an offer on the part of the plaintiff, to do equity. The accounting is not merely instituted to assess actual damages but is one of the primary objects of the cross-bill.

Appellants contend that an injunction should have been granted because of the inadequacy between the consideration and the damage. That issue that by his answer, appellee further denies every allegation inconsistent that would take such case out of the statute of limitations and already the statute, but view if his answer is taken as true that would not maintain that; answers by his cross-bill to allege a condition of matters, and nothing of circumstances any appellants, within the period of the statute, under a mutual understanding with them for an equitable of the accounts in matter and demanded, as stated in the pleadings and, he must waive for alleviation of the cross-bill, appellants claim should not be barred by the statute. A proper analysis of the issues and the cross-bill, however, does not support this contention. In fact his cross-bill and his answer suggested matters relative to an investigation,

from him to appellants, other than the one alleged against him by the latter in their bill. By his cross-bill appellee claims that under the mutual understanding referred to, he would be entitled to certain credits on "his debts" to appellants. The credits thus claimed having occurred within the period of the Statute would operate to take "his debts" so referred to, out of the statute. This pleading is not inconsistent with that contained in the answer. It would be, if by his answer appellee admitted the debt alleged in the bill but claimed that it had become barred by the Statute of Limitations but the answer does not do that. On the contrary, it denies the alleged personal debts on which the appellants base their suit, namely, the alleged personal indebtedness of $17,000 and the alleged promise of Raftree to pay the mortgage debt which the complainants claim to hold as collateral for the alleged personal indebtedness. It must be remembered that the mortgage debt referred to, against which Raftree pleads the Statute of Limitations in his answer, is not a part of "his debts" as referred to by him in his cross-bill, unless he assumed and agreed to pay that mortgage debt when he took title to the property or unless he acknowledged the existence of that debt as a valid lien against his property, and personally promised to pay it. There is no inconsistency in his pleadings so far as the mortgage debt is concerned because by his pleadings he alleges that he did not assume and agree to pay that debt when he took title to the property in question and he denies that in March, 1913, he admitted that the mortgage debt was then a valid lien against his property, as the complainants allege, or that he ever promised to pay said debt.

It is further claimed by the appellants that the

cross-bill filed is fatally defective in that it does not disclose any debt owing by appellee to complainants and within the subject-matter of the original bill, against which his claim to an equitable set-off could apply; and therefore its subject-matter is not germane to that of the original bill.

The cross-bill, in our opinion, is sufficient, in and of itself, to support the prayer for relief which it contains, for it alleges that the appellee Raftree is the owner of the property involved in the foreclosure proceedings brought by the original bill and that there was a mutual agreement or understanding between the parties to the effect that the indebtedness of one should go in liquidation of the indebtedness of the other, which is more than an allegation that there were certain cross demands existing between the parties. Under those allegations any claim which appellee may have under the mutual agreement or understanding, pleaded by him in his cross-bill, may be set off in the action to foreclose. Wiltsie on Mortgage Foreclosure, (3rd Ed.) Sec. 442; 3 Story's Equity Jurisdiction, (14th Ed.) Sec. 1871. It should be noted that in his cross-bill appellee in no way mentions or refers to the indebtedness alleged by appellants in their bill, and he does not pray that such amount as may be found due him from the trustees under their alleged mutual understanding may be set off against the $10,000 indebtedness which he admits but that it may be set off "against the indebtedness if any, which said trustees may have against him or which they may be entitled to have." In our opinion the cross-bill is both consistent with the answer and germane to the original bill. Under the issues formed by the pleadings in the case at bar, and without any reference to the other case with which it has been consolidated, it might be found upon the

submission of the proof that the trustees were entitled to have and did have an indebtedness against appellee not only of the $10,000 which he admits but also of the $17,000 which the appellants claim, in which case there would be set off against that total indebtedness, under the alleged mutual understanding between the parties, if such understanding is established by the proof, such indebtedness as the evidence may prove to exist against the appellants and in favor of the appellee.

For these reasons we are of the opinion that the cross-bill is not open to the objections which appellants have urged. Under the circumstances we are of the opinion that the court was warranted in entering the interlocutory injunction order appealed from. Brown v. Schintz, 109 Ill. App. 598. There being no error in the record, the motion appealed from is affirmed.

AFFIRMED.

[illegible] of the proof that the transfers were initiated in June and the bank is [illegible] equitable [illegible] of the $18,000 which he [illegible] and also of the $17,000 which the specialists state. In which case there would be no dispute that total [illegible], under the alleged mutual misrepresentation between the parties. If such misrepresentation is established by the proof, such instruments on the evidence may place the [illegible] the appellants not in favor of the appellee.

For these reasons we are of the opinion that the error-[illegible] is not cure in the [illegible] [illegible] here [illegible]. Under the circumstances [illegible] of the writing that the [illegible] [illegible] is entitled to [illegible] [illegible] [illegible]. Dunne v. [illegible], 3d Ill. App. 458. The [illegible] in error in the record, the [illegible] [illegible] from is of [illegible].

Affirmed.

243 - 24173

(672a)

MARY GENTRY, Administratrix of the Estate of John S. Gentry, Deceased,

Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY, a corporation,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

214 I.A. 671

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Mary Gentry, as administratrix of her deceased husband's estate, brought suit under the Federal Employers' Liability Act to recover damages caused by the deceased's being accidently killed while in the employ of the defendant. There was a verdict and judgment in plaintiff's favor for $5,000, to reverse which this appeal is prosecuted.

The record discloses that for about two years prior to the accident the deceased had been employed by the defendant as a switchman in its railroad yards in Chicago. These yards included all of defendant's tracks from the terminal at the Union Station at Canal and Adams streets out to and including what is known as Brighton Park, located in the vicinity of 37th street and California avenue. His duties as switchman were principally to make up freight trains in the yards, and a part of this work required him to act as pilot which was somewhat similar to the work he was doing at the time he was killed. On a few occasions previous to the accident the deceased acted as an extra pilot, taking the place of the regular pilots when they were

not available and his duties as such were to take empty passenger trains from Brighton Park to the Union Station. These trains were backed up, the pilot being on the rear platform of the last car with a "tail hose" in his hand attached to the air line of the train, by means of which the pilot could notify the engineer at the other end of the train, and the two could control the movements of the train and in addition either one could stop the train independent of the action of the other. The deceased having worked in and about the yards for a considerable length of time prior to the accident was familiar with the movements of the trains, the location of the cross-overs, and signals. The yards at Brighton Park were from a half to three-quarters of a mile in length and extended generally in an east and west direction, and some of the passenger trains made up there pulled out onto the main track running to the Union Station from the east end of the yards and some from the west end of the yards. There were two main tracks to the Union Station and a number of switch tracks extended up to Halsted street, a distance of two and a half or three miles. At the place of the accident there were about sixteen tracks. On the day in question there were as usual two passenger trains made up in the Brighton Park yards, known as No. 7 and No. 11. No 11 was due to leave Brighton Park for the Union Station at 9:30 P.M. and No. 7 was due to leave at 9:40 P.M. for the same place. East of the yards the two main tracks crossed the Pan Handle railroad tracks. It was usual and customary to make up train No. 11 in the yards headed west and in leaving the yards it pulled out to the west on to the main line, and then backed up to the Union Station. It was also customary to make up train No. 7 in the yards headed east, and in leaving the yards it pulled out to the east from

not wholly. And the drive he took was in large measure responsible for the success with which the Tenth Division, there situated when morning came, the point being on the road leading to the last and very valid reason that had kept Lee from attacking in the air line of the Union, by means of which the right flank would really have occupied in the attack on the trains, and the two would combine the movements of the trains and in addition which one would cut the Union lines of the center of the army. The Sixteenth Corps marched in and about the ground for a considerable length of time prior to the execution was finally with the movements of the trains, the flanking of the Sixteenth, and regardless. The point at Chickahominy River was then to be Sheridan-Custer of a mile in length and regardless immediately in my mind was that Sheridan, and also of the passing-Sheridan made to Sheridan. Sheridan had joined in his first fighting from the west and of the point and from the Sixteenth. Sheridan with two main forces to the Union flanking and a number of mobile brigade cavalry by a mounted infantry, a division of the and with a bit of fine action. At the point of the principal there were Union cavalry flanking. On the day it operations there were to cancel the Sheridan march on in the Sixteenth from points, Sheridan on the. T and the. Ill. So it was was to cause strengthen that the line Union cavalry at 7:30 P.M. and the. T was now to begin at 7:45 P.M. for the time frame change. Much of the cavalry for the main attacks against the Sixth Cavalry Division. It was quite that according to model on June 30. It is the point mounted were and in driving the point it became was to the to the main line, and line moving up in the Union flanking. It was also necessary to make up time. I in the cavalry Sheridan and, and in leaving the point it pulled out in the most time

a lead track which went into the main line just west of the Pan Handle crossing, and proceeded towards the Union Station, until just west of Halsted street where it stopped to take on water. This train then proceeded to what was known as the C.B.& Q. "Y" where it was turned around, and then backed up to the Union Station. Just prior to the accident train No. 11 left Brighton Park yards as usual, with the deceased acting as pilot. When it reached the main tracks on which it was to back up to the Union Station, a switchman located there stated that a passenger train known as No. 78 coming from the west was late, and therefore No. 11 waited for about fifteen minutes until this train had passed. It then pulled out on the main track and started backing towards the Union Station. As usual it stopped at the Pan Handle crossing, and this was accomplished by the deceased's manipulating the air by means of the "tail hose". It then started on its journey. In the meantime train No. 7 had pulled out at the east end of the yards and after passenger train No. 78 had passed it came out on to the main track headed toward the Union Station. It was thus proceeding on the same track some distance ahead of No. 11. No. 7 came to a stop just west of Halsted street, and was taking on water, and while it was at this point No. 11 ran into it and the deceased was instantly killed. No. 7 was a passenger train carrying seven or eight sleepers, and was due to leave Union Station for St. Louis at 12:01 A.M.; No. 11 was an express train with the exception of one sleeper, and was scheduled to leave Union Station at 11:30 P.M. for Kansas City.

The defendant contends that the judgment should be reversed without remanding, because the evidence demonstrates that the deceased assumed the risk, and that he was injured solely by reason of his own negligence -- as stated by counsel,

A short distance which was left; the main line lies just west of the Fox Valley Junction, and provisions towards the Fox Valley Junction, until just west of Dakota village where it diverges to take an easter. This line lies presumably to what was known as the S.S.M & O. "TT" which is now Canadian National, and this Junction is the line Tolles Station. Just prior to the railroad breaks the. It isn't difficult that point to locate, with the Canadian Pacific on right. Then it crossed the main tracks in village it was in the Tolles Junction, a substantial brick building stands that a passenger train stopped on to. To working from the west was into, and departure to. It making the trains difficult although until this train had gone. It then proceed out on the main tracks leaving junction. Or about it changing at the Dakota. Accordingly, and this was not permissible by the conductor monopolizing the sale of tickets on the "Fast Mail". It then stopped at the Junction, in the operation train No. 7 had pulled out of the main at the Tolles and after departure train No. 8. If had passed it train so is the main track behind the Tolles Junction. It was then proceeded on the west bound same distance about at No. 12. No. 7 came up a step just west of Dakota village, and was taking on water, and while it was at that point No. 12 was first the crossing was temporarily blocked. No. 7 was a passenger train carrying mails at night passengers, and was due to leave Tolles Station ten to. Leaving at 12:20 a.m. No. 12 was an express train with the exception of one element, and was scheduled to leave Tolles Station at 12:30 a.m. (no leaves 12:1).

The situation confronting the junction agent at Tolles was critical somewhat. Because the "Fast Mail" was late the crossing without notice the view, and that he was leaving although he knew of the fact that the passengers -- he stated to [illegible].

that the deceased was 100 per cent negligent. It has been repeatedly held under the Federal Act that the employe assumes the risks of dangers ordinarily incident to his employment, so far as the same are not attributable to the negligence of the employer or those for whose conduct the employer is responsible. C.& O.R. Co. v. Proffitt, 241 U.S. 462. Of course if the employe becomes aware of his employer's negligence, or if such negligence is such that he must be presumed to have known it in time to prevent his being injured, he could not recover. In the latter situation, however, it might be held that the injury to the employe was caused solely by his own negligence. In the instant case, therefore, we think it clear that unless it can be said that the deceased came to his death solely by reason of his own negligence, and that the verdict of the jury finding specifically that his fatal injuries were caused by his own negligence to the extent of fifty per cent only, is against the manifest weight of the evidence, then the doctrine of assumed risk cannot defeat a recovery, and the verdict must stand.

The uncontradicted evidence is that, according to printed time schedules, train No. 11 was to leave Brighton Park before No. 7, and that on occasions when this order was reversed there was an announcement made of this in bulletin books kept in the Brighton Park yards. There is no evidence in the record as to what orders were given to the two train crews on the day in question in reference to leaving Brighton Park yards, although the evidence shows without contradiction that this bulletin book was in existence and might have been produced, but it was not produced. No one testified, nor is there any evidence, as to what orders or instructions the

deceased received prior to leaving the yards, and it seems clear that he did not know that he was following No. 7, unless it can be said that he saw the signals from No. 7, which will be later referred to; while the uncontradicted evidence is that the pilot on No. 7 knew that No. 11 was following, and that the negineer of No. 11 knew this fact. The evidence also tends to show that for some time prior to the accident No. 7 had preceded No. 11 the greater part of the time, one witness testifying that No. 7 preceded No. 11 ninety per cent of the time for a period of time prior to the accident. The undisputed evidence also is that No. 7 almost invariably stopped from seven to twenty minutes at Halsted street to take on water, and the engineer of No. 11 testified that because of this he was often required to stop No. 11 to wait for No. 7 to proceed. There is some dispute in the evidence as to what occurred just prior to the accident.

The witness Kage, called on behalf of the plaintiff, testified that he was the porter on No. 7, riding in the rear car in the third compartment from the rear or west end of that car; that with him in the compartment was one Marley who was the pilot on No. 7; that he was reading his bible aloud and Marley was listening; that as No. 7 stopped west of Halsted street to take on water, Marley suddenly got up and rushed to the rear of the car; that he heard some one "holler" and immediately the collision occurred.

Marley, called by the defendant, and whose duties were the same as those of the deceased when his train was backing up after it had reversed its position on the "Y", but until such reversal he was required to protect the rear

economical receipt paid to landing the parcels, yet it seems clear that he did not know that he was injuring Co. T, unless it may be said that he was the agent from Co. T, which will be later referred to; while the communication is that was given on Co. T from Co. II was following, and that the engineer of Co. II knew this fact. The evidence also tends to show that the train was prior to the accident Co. T had preceded Co. II the greater part of the time, and without investigating that Co. T proceed Co. II merely got out of the time for a period of time prior to the accident. The conclusion evidently also is that Co. T almost invariably stopped from ten to twenty minutes at Malden either to take on water, and the evidence of Co. II testified that because of this he was often required to stop Co. II. It is said for Co. T to proceed. There is some dispute in the evidence as to what occurred just prior to the accident.

The witness Cage, called in behalf of the plaintiff, testified that he was the porter on Co. T, riding in the rear car in the train; departure from the rear car was of that car; that with him in the compartment was another who was the clerk on Co. T; that he was reading his brain about and thought was listening; that as Co. T approached Co. II testified where to take on water, during twilight; that no red signal in the rear of the car; that he heard some one shouting and immediately the collision occurred.

Lastly, called by the defendant, and which testimony was the same as those of the witnesses when the train was building up after it had pre-read the position as the "T", but until such arrangement he was engaged in preparing the road

of No. 7, testified that he was in the compartment with Kage; that as No. 7 stopped he got up, went to the rear of the car, got out on the track and started walking west; that after walking a short distance he saw No. 11 coming into view; that he thereupon signaled with his lantern for No. 11 to stop; that he had walked about 100 feet and was continually signalling; that No. 11 came on without slacking its speed; that he saw Gentry at his proper place on the back platform on the last car of No. 11; that when he saw there was to be a collision, since the speed of No. 11 was not slacking, he shouted to the deceased, and immediately the collision occurred without any slacking of speed, and the deceased was killed. On direct examination Marley admitted he was a little hard of hearing, and on cross-examination, in response to a question as to whether he had heard any sound from No. 11, indicating that the air was being applied, said: "It sounded to me like the man was starting to apply the air preparatory to making a stop, but I couldn't say --" He was then stopped by counsel for defendant. Thereupon the cross-examination proceeded on other lines.

The engineer Benjamin, on No. 11, testified on behalf of the defendant that when he went to the roundhouse to get the locomotive preparatory to coupling on to No. 11 in the yards, he saw the deceased near the engine; that when they were ready the deceased signaled him to pull out of the roundhouse; that Gentry preceded the engine to the train, walking; that he then signaled the witness to pull ahead; that this was about 9:30 P.M.; that Gentry threw the switch after he had gone up to the coaches; that he could not state whether Gentry himself did the coupling; that before they started Gentry by means of the "tail hose" tested the air and also by the same means the

signal whistle, which is connected with the air line extending under the cars throughout the train; that everything was in working order; that by means of this "tail hose" there would be indicated on a dial in front of the engineer in his cab, notice to the engineer that the train should be stopped or the speed regulated; that it was the witness' duty to move a valve in "lap" which would assist in regulating the speed or stopping the train. The witness further testified that after they got on the main track he got the proper signal from the deceased to start, and when they had proceeded to the Pan Handle crossing the proper signal was also received and the train stopped; that after this stop he again got the usual signal, "three blasts, to back up -- three signal whistles" from the other end of the train; that upon receiving these signals he backed the train up until the collision occurred; that just prior to the collision the speed of the train was from fifteen to eighteen miles an hour, not more than eighteen miles an hour; that the speed could be controlled by the deceased; that from the time No. 11 left the Pan Handle crossing until the collision the witness was sitting in his seat in the usual place with his hand on the brake valve; that he was expecting to receive a signal to put the valve in "lap" and was expecting any moment to apply the brake valve in "lap" to assist in stopping the train; that he was ready to stop the train on signal; that many times on prior occasions, if he was in a hurry, he usually went a little faster if he thought it was clear; that if he exceeded the speed which he thought was safe at certain places, he would check the speed himself; that if he was going twenty-five miles an hour and thought it was dangerous he would check the speed, otherwise he left it to the pilot to protect the

rear of the train and govern the speed; that on prior occasions he often stepped six or seven times between Brighton Park and Halsted street; that prior to reaching Halsted street the tracks were not straight but were in what is known as a reverse curve, somewhat in the shape of a letter "S"; that the curve was not abrupt but slight; that with the rear end of a train carrying lights such as No. 7 did, he could see and locate on which track No. 7 was at least 500 feet; that on prior occasions he often had to wait for No. 7 to take water at Halsted street; that at the time in question No. 7 carried a large advertising light on the rear car and that it was burning; that he saw the light as he was coming around the curve at the Pan Handle crossing; that he looked back over his train when he was about 500 feet west of the Pan Handle crossing and saw a light about a quarter of a mile back or ahead of him on No. 7; that he did not check the speed of his train until the collision occurred, and in answer to a question on cross-examination, he said: "As I approached Halsted street I cannot say positively that there was no application of the air. I have no knowledge of knowing that there was any application made."

Kage testified that this advertising light on No. 7 was not lit; that it was his duty to light it when he got to the Union Station. Marley testified that it was lit, but that he did not light it and did not know who had done so.

The deceased had not been working on the day previous to the accident, nor on the day of the accident, until he was sent for about 4 o'clock in the afternoon, and there is some evidence that he had been ill. On the contrary plaintiff

what it has taken and carried the speech; then we have
examined in other aspects why or after those whose
intuition has been disturbed somewhat that prior to reading
Hegelian systems the image never has arisenin his mind in
what is known as a priori mode, commencing in the phrase
of a letter "If; then the point was not already had existed;
then with the rose and if a stage marching filters away
as to. I did, he would see not lessen as much trade to. I
was in lines for fact; that is unique experience of ideas
had of half the to. I to lack which of thought stress;
that at the time in question to. I without a large advertis-
ing field in the same way and that is one hundred; then he
due the field as to see making crowd the years of the
thought concerning that to trying been only its study when
he was there; the fact was of the the thought proceeding-not
the a right about a question of a side half-a-dozen of the
to. I; such to did not about the work of this large point
the motivation concerned, and to answer to a question on consci-
ousness, he said: "as I experience relative stress I
cannot say positively that there may be equivalence of the
size. I have to knowledge of meaning that there was not
qualitative mode."

Some critiques that view advertising light on
to. I was not lit; that it was the only to light is some
not yet in the thing problem. Making critiques that is
not its, but that to the not light is not its or some
the not this to.

The concept that not been working on the day prior-
lace to the meeting, was in the day of the minister. until he
had read the about a student in the interview, not that is
some problems that he had been in. So the written statement

testified that he was not ill when he left home on that day. There was evidence introduced on behalf of the defendant that tended to indicate that the deceased was under the influence of liquor about 9 o'clock P.M. Other witnesses testified that they saw him shortly before he left the yards, and that he showed no such indications.

In addition to the general verdict for $5,000 in favor of the plaintiff, the jury answered several interrogatories, wherein they found that the deceased was guilty of negligence that contributed to his injuries, and that by reason thereof they had diminished the damages fifty per cent.

It is obvious from the engineer's testimony that he did not know whether the deceased had signaled him to place the valve in "lap", since the dial on which it would be indicated was in front or west of him, and during the progress of the train he turned and looked to the east and saw the lights on No. 7. Of course if a signal was given while he was thus looking to the east, he would not be aware of it. It is also clear that if the jury believed the porter Kage and disbelieved the pilot Marley, they might properly have found that Marley was guilty of negligence in not protecting the rear of No. 7. The accident occurred at night in a railroad yard where there were sixteen tracks, and the track on which the two trains were was not straight but a reverse curve, and the jury might well believe from the evidence that the deceased was unable to determine on which track No. 7 was, even if he saw the lights, until it was too late. And since there was no evidence of any order given to the deceased that the printed rules which authorized his train to proceed first had been obviated, and that he was being preceded by No. 7, it might well be that the deceased was

taken unawares when he discovered No. 7 in front of him. Furthermore, the uncontradicted evidence is that Gentry had properly performed all his duties up until the train on which he was pilot had passed the Pan Handle crossing, which was but a short distance from the place where he was killed, and but a very few minutes before that time. And Marley, testifying for the defendant, says that Gentry was in his proper place on the platform of the rear car at the time of the collision. The undisputed facts and circumstances shown by the evidence render much of the testimony of defendant's witnesses incredible, and it is not surprising that the jury took the view of the case they did, and upon a consideration of all the evidence, we think it cannot be said that the finding of the jury that the defendant was guilty of negligence which contributed to bring about the accident, is against the manifest weight of the evidence.

The defendant also contends that the court erred in refusing to admit in evidence the written application for employment made by the deceased to the defendant. This was the usual blank form filled out by persons seeking employment, giving the nature of the applicant's former employment, experience, and a statement that he would observe the rules of the company, etc. It was properly excluded, as it would in no way assist the jury in arriving at a proper determination of the case, but would only tend to confuse.

In selecting the jury counsel for defendant asked this question: "If you were in my place, representing the railroad company, and you wanted to get twelve fair minded men to try the issues, would you take a man who is in the

[illegible] [illegible] [illegible] [

frame of mind you are in now on a jury to try the issues in a case of this kind?" The court on its own motion refused to permit this question to be answered. The defendant does not contend that it was prejudiced thereby, but asks us "to satisfy the trial judge by passing on this question." We think the question was entirely proper.

Complaint is also made that the defendant was not permitted to ask the witness Kage concerning what he testified to before the coroner's inquest, for the purpose of impeachment. During this examination, the court repeatedly asked counsel to point out wherein the witness had testified on the trial different from the testimony which he gave before the coroner. This counsel attempted to do, but we think there was no material difference in the testimony of the witness.

It is also argued that the court erred in giving and refusing instructions. The court gave seven instructions submitted by the plaintiff, and twenty-two submitted by the defendant and modified and gave six others submitted by the defendant, and refused eleven offered by defendant. The court also gave six special interrogatories submitted by the defendant, for the jury to answer, and denied three. If there is any criticism of the instructions given by the court it is that there were too many. The practice of giving a great number of instructions has been repeatedly condemned by our Supreme Court, and justly so, for they only tend to confuse the issues, while their purpose is and should be to enlighten the jury. A great many of the complaints made are that they did not take into consideration the doctrine of assumed risk, but since we have held that this doctrine does not apply in

Phase of what you may be now or a party to try the issues in a case of this kind." The court is also entitled to place this question to the jury. The defendant may have an argument that it is improperly, but when we the actually the trial judge in passing on this question, we state the question was certainly proper.

Moreover it also seems that the instructions was not prejudicial to us. The witness Sage testified that he before the accident happens. Further evidence of his performance. During this examination, the court correctly asked counsel to point out through the witness and satisfied on the trial different from the testimony which he gave before the accident. This counsel attempted to do, but we think there was no material difference in the testimony of the witness.

It is also argued that the court erred in giving and refusing instructions. The court gave proper instructions applicable to the plaintiff, and properly refused by the defendant and modified and gave the others requested by the defendant, and refused those offered by defendant. The court also gave the special interrogatories requested by the defendant, for the jury to answer, and denied others. If there is any criticism of the instructions given by the court it is that more were too many. The practice of giving a great number of instructions has been repeatedly condemned by our supreme court, and justly so, for they only tend to confuse the jurors, while their purpose is and should be to enlighten the jury. A great many of the requests made are that they did not much more constituting the doctrine of common law, but there we have held that this doctrine does not apply in

the instant case, the instructions were properly refused, and those which did not contain the doctrine of assumed risk were for the same reason properly given.

Complaint is made of instruction No. 1, given on behalf of the plaintiff, for the reason that it told the jury that contributory negligence on the part of the deceased would not bar a recovery, whereas the defendant says that if his "negligence was 100 per cent it would bar a recovery." This objection was fully covered by other instructions submitted by the defendant. We have examined all of the instructions given and refused, and the modifications of them, and while some of the objections urged have some merit, yet we find that the points were covered by other instructions given, and, on the whole, the defendant received the benefit of every protection it was entitled to.

Complaint is made that the answers to the special interrogatories are inconsistent with the general verdict, the argument being that the plaintiff could not recover if the deceased failed to exercise ordinary care for his own safety. This is not the law under the Federal Employers' Liability Act.

It is also urged that the answer to interrogatory No. 4 is inconsistent with the answer to interrogatory No. 5. By No. 4 the jury said that it was usual and customary for No. 7 to arrive at Halsted street prior to No. 11, and in answer to interrogatory No. 5, said that the movements of trains Nos. 7 and 11 on the night of the accident were the usual and customary movements of those trains. We see nothing inconsistent or irreconcilable in the two answers given. It might well be that the jury found that the movements of

the instant case, the instruction was properly refused, and thus the jury did not consider the question of damages that both the lower courts erroneously gives.

Complaint is made of instruction No. 5, given on behalf of the plaintiff, for the reason that it tells the jury that contributory negligence on the part of the deceased would not be a defense, because the instructor says that if his negligence was slight and it would not a proximate cause this relation was fully covered by other instructions which had by the defendant. We have declined all of the instructions given and refused, and the modification of them, and which none of the objections which they took except, yet we find that the jurors were informed by other instructions given, and, in the whole, the defendant received the benefit of every proposition it was entitled to.

Complaint is made that the sentence in the opinion introduced the instructions with the general verdict, the argument being that the plaintiff should not recover if the defendant failed to sustain affirmative over the his own money. This is not the law under the General Negligence Statutes.

It is also urged that the answer is interrogatory No. 4 is inconsistent with the answer to interrogatory No. 5, by No. 6 the jury said that it was usual and customary for the. T is written as directed always prior to No. 11, and in answer to interrogatory No. 5, said that the maintenance of lamps was. T was it on the night of the accident was the usual and customary maintenance of lamps required. We see nothing inconsistent or irreconcilable in the two answers given. It might well be that the jury found that the maintenance of

the trains were usual and customary, but that the order of proceeding to the Union Station was reversed. Both trains were made up and operated in the usual manner, No. 11 backing up and No. 7 proceeding forward, with the pilots and engineers in their proper places, etc. The practice of giving a number of interrogatories such as in the instant case has also been condemned by the Supreme Court, as tending to confuse rather than to assist the jury in arriving at the proper solution of the case.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

MR. PRESIDING JUSTICE THOMSON DISSENTING:

I am unable to concur in the foregoing decision of this case. It would serve no purpose to enter into an analysis of the evidence as I view it, which is the basis of my opinion, that the verdict was against the manifest weight of the evidence and that the judgment of the trial court should, therefore, be reversed with a finding of fact to the effect that the defendant was not guilty of any negligence proximately contributing to the accident which caused the death of the deceased, but that such death was caused solely by the negligence of the deceased, himself, and was due to a condition which was an ordinary and usual incident to his employment and one which he knew, or which was so obvious and plainly observable, that he must be presumed to have known it.

the tension were equal and opposite, but that its value at pro-
ceeding to the right flexure was different. This tension was
made up with elements in the local member, so, it involving
an use for a preceding flexure, also the effects on neighboring
in their proper places, etc. The procedure of giving a number
of intermediatories with so in the instant with the plus sign
mentioned by the interior block, or finding in another rather
than it merely the plus is involving at the proper multiplied
of the sum.

The judgment of the engineer could of such thought
in efficiency.

Attached.

Mr. Benedicto Martin Tamayo Discussion:

I am unable to answer in the designing methods
of this road. It would appear as quickly if after line of
analysis of the minimum on 2 time it, which is the basis
of my problem, that the engineers had adopted the modified
method of the minimum and also the judgment of the point
means somewhat, however, he involved also a tension so
that he the method that the minimum was not partly of
any multiplication practically monitoring in the building
which means the depth of the beneath, but that such depth
was moved mainly in the multiplication of the measure, finally,
and the dam is a monitoring which was so accurate and avoid
tension in his multiplication and the minimum in sum, as that
the so greater and plainly therefore, that he took he pre-
ceed to have lower it.

181 - 24528

MIKE KASSA and SOPHIA KASSA,
Appellees,

vs.

CELIA GOLDRICH,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

214 I.A. 672

MR. JUSTICE TAYLOR delivered the opinion of the court.

This appeal is from a judgment in favor of the plaintiffs, Mike Kassa and Sophia Kassa, in the sum of $1075.00. On October 26, 1917, the plaintiffs brought suit in assumpsit against the defendants, Celia Goldrich and Samuel Goldrich. Subsequently the plaintiff took a nonsuit as to the defendant Samuel Goldrich. The statement of claim set forth that the plaintiffs loaned the defendant the total sum of $1325.00 made up as follows: August 5th, 1916, $100.00; August 17th, 1916, $50.00; September 23rd, 1916, $100.00; October 18th, 1916, $150.00; December 1st, 1916, $275.00; December 26th, 1916, $125.00; January 16th, 1917, $75.00; April 2nd, 1917, $25.00; April 2nd, 1917, $75.00; April 6th, 1917, $50.00; April 18th, 1917, $300.00. Defendant Celia Goldrich filed an affidavit of merits in which she stated that neither of the plaintiffs ever loaned any money to her; that she never at any time requested them or either of them to loan to Samuel Goldrich or herself any money whatever; that she never received any money from either of them. She further denied that she owed the plaintiffs or either of them the sum of $1325.00 or any sum whatever.

86. Photon tables delivered the opinion of the court.

This appeal is from a judgment in favor of the plaintiff, Alan Dunn and Angela Dunn, in the sum of $1972.12. On October 10, 1972, the plaintiff brought suit in Jacksonville against the defendants, Julia Robins and Samuel Robinson. Subsequently the plaintiff took a nonsuit as to the corporate owned rightfulness. The statement of claim set forth that the plaintiff began the laboratory the total sum of $1972.12 with no-fa illinoy: August 5th, 1969, $100.00; August 17th, 1969, $80.00; September 8th, 1969, $100.00; October 15th, 1969, $100.00; December 1st, 1969, $172.12; November 20th, 1969, $100.00; January 18th, 1970, $75.00; April 6th, 1970, $100.00; April 20th, 1970, $75.00; April 8th, 1970, $75.00; April 9th, 1970, $75.00; April 12th, 1970, $100.00. Defendant Julia Robinson filed an affidavit of minimis in which she stated that neither of the plaintiffs ever loaned any money to her; that she never at any time requested them to advance at least to loan to Samuel Robinson or request any money whatever; that she never received any money from either of them. The petition alleged that she had not paid plaintiffs at either of times the

An affidavit of merits was filed by Samuel Goldrich setting up, among other things, that on November 7, 1917, he filed a petition in bankruptcy and scheduled the claim of Mike Kassa and Sophia Kassa therein and that the petition is still pending.

The cause was tried before the trial judge without a jury. The evidence shows on behalf of the plaintiffs that various sums of money were loaned from time to time to the defendant Celia Goldrich, which in the aggregate amounted to $1075.00. The first three items, aggregating $250.00, which are mentioned in the statement of claim, it was admitted by the plaintiffs were loaned to Samuel Goldrich and no claim was made therefor. The evidence of the defendant, Celia Goldrich, is to the effect that she never borrowed any money from the plaintiffs and that she never even saw the plaintiff Sophia Kassa until she was at the court house in the bankruptcy court just before Christmas, 1917, which was long after the date at which plaintiffs testified she received from them the last loan in the sum of $300.00. The witness Samuel Goldrich, the husband of the defendant Celia Goldrich, testified that the whole of the money was borrowed by him personally and that he invested the money in the decorating business. The testimony on behalf of plaintiffs and that of the defendant is irreconcilable.

In deciding the case the trial judge made the following statement: "The only question in this case is, is Celia Goldrich liable in the sum of ten hundred and seventy-five dollars to the plaintiffs? The evidence shows that the plaintiffs in this case because of their confidence in the defendant

In affirming a decision was filed by Sweet
against Hilling et. al. (and other defendants, that is December
7, 1917. In which a petition is mentioned and considered
the minds of John Stone and Angela Sweet Barrett was that the
property is their mutual.

The whole was filed under Section 104 Lands Property
& Law. The petitioner where is bound if the plaintiffs have
written about it among which letters from Stone to Sam to the
defendant Hilling filtered, which is the equitable ownership
in itself. The first three items, mortgaging land, is
made on our conditions in the agreement of trust. If you re-
ceive by the plaintiffs were issued to Samuel Hilling
and in which we hold interest. The principal of the instrum-
ent, Hilling pointed, is in the effect that the money lifetime
was taken from the plaintiffs and that the owner gives our
the principal though Stone still is yet at the most lawyer
in the transaction which just either charges, 1917, which
was filed after the death of Angela Barrett initiated who
signed the trust. Hilling the first time in the 20th of 1917. The
defendant Samuel Hilling, the husband of the deceased Angela
Barrett, therefore just the trust of the property was between
the husband and they in interest was owing in the mortgag-
ing transaction. The instrument of petition and land
is the property is interpleaded.

In holding the view the trial judge made the following
observation: "The only evidence is that over is, in fact
deceased lands: in the use of the husband the mortgage
money in the plaintiffs. The witness which just the decea-
sed is only just handed it their mortgage is the interest

Sam Goldrich and relying on his honesty and fair dealing, in the course of about a year loaned him the sum of thirteen hundred and twenty-five dollars without any security therefor. They took no evidence of indebtedness and made no provision for payment of interest. Purely a friendly act. The evidence does not show how it came about that he gained their confidence, but it is admitted that the plaintiffs in this case did actually part with that money. Goldrich then filed his petition in bankruptcy. Plaintiffs claim that the money was loaned to both defendants jointly. It seems that at the time he went into bankruptcy, or rather at some time prior to that, a piece of property was purchased by the wife of Samuel Goldrich -- she took title to it. It is true that she claims it was her money that she invested. She said she had five hundred dollars at the time she purchased it. But she makes no effort to show how much money is invested in the property now, how much money has been expended on the property since the purchase, how much her equity is, how much she has earned, or what occupation she has followed so that the court may be in a position to see whether or not any additional money was invested in the property either by way of paying for repairs or making improvements. The question therefore comes down to this, who is telling the truth, the plaintiffs or the defendants? It is difficult to believe the story of these shrewd defendants, that Goldrich was able to gain the confidence of the unsuspecting plaintiffs to the extent of getting thirteen hundred and twenty-five dollars out of them, and that this cunning wife who in order to protect themselves took the property in her own name, did not know what was going on; that the husband was getting this money. I am to pass upon the veracity of the witnesses. The least I can say is

that the plaintiffs' testimony, the testimony of those people who have been cheated out of their money is as worthy as the testimony of the defendants in this case. I am convinced that their testimony, given in a straightforward manner showing the details of the transactions is much more reasonable and much more truthful than the testimony of these cunning defendants; they confess that at least one of them has succeeded in getting money of the plaintiffs without ever paying back and got a discharge from the obligation. The lady (the plaintiff) is corroborated by the testimony of her husband who says twice he was there when the money was counted over and that the defendant Celia was there. If he didn't mean to tell the truth why didn't he say that he was there each time when the money was turned over? He limited it in his testimony to only two occasions -- and the wife testified too, that at the time she paid the three hundred dollars "my husband was there." It came voluntarily without the result of any questioning and bears all the earmarks of truth; whereas the defendants make a directly opposite impression.

I believe the plaintiffs have sustained the case by a preponderance of the evidence and the judgment will be for the plaintiffs in the sum of ten hundred and seventy-five dollars."

It is the contention of the defendant that the finding of the trial court is contrary to the weight of the evidence. Of course, there are some discrepancies - and it is natural that there should be - in the testimony of the plaintiff Sophia Kasan in regard to dates and amounts

that some plausibility attaches, some credibility of claims
should also have been obtained with at first sight, in an
equally as the testimony of the non-defendants in this case.
I am mentioned that Lady Elizabeth, given in a particular-
forward manner showing the defendants or the transactions
in which were responsible and such more interesting than the
testimony of those remaining defendants; that matters that
no Jones may or have been responsible in getting money or
the plaintiff's actions which being both and yet in also
change that the defendants. The lady like plaintiff
is nonetheless by the testimony of her husband who also
claim to be more than some the report and something were
case the defendants claim was lawful. If in stately also is
still the truth why claim is by the that he was there when
like those the money was received event. The lawfulness is in
the testimony in only the questions -- but the only lady
that is, that is the time the paid the there lawfulness
actions the lawful was there.* It seems reasonably allo-
wed the result of the questionably and hence all the com-
mentary of lawfully answers the determinate area a discussion
relevant lawyers.

I believe the plaintiff have worthless the same
by a arrangements of the witnesses and the judgment will be
for the plaintiff in the sum of the lawful and reasonable
fees allowed.*

It is the understanding of the national that the
finding of the trial court is conformed to the weight of
the evidence. If lawful, there are some discrepancies -
and it is conceded that there should be -- in identifying
of the plaintiff Lydia Jones in relation to Jones and Alcorta

and as to what transpired. But it is not to be expected that such a witness would be able to tell every detail of such a series of transactions running over a period between August 5, 1916 and April 18, 1917, involving eleven transactions aggregating $1325.00. In Hess v. Killebrew, 209 Ill. 193, the court said: "Where the trial court, in a trial without a jury has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court on mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, on appeal, unless such findings are clearly and manifestly against the preponderance of evidence."

Under the circumstances of the case, believing that the trial judge was in a much better position to determine the single question of credibility than we are, we are of the opinion that the judgment must stand.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

and as to what transpired. But it is not to be suggested that such a witness would be able to tell every detail of such a series of conversations running over a period between August 8, 1916 and April 18, 1917, involving eleven transactions aggregating $17,000.00. In Rex v. Hillcoker, 22C III. 193, the court said: "Where the trial court, in a trial without a jury has had an opportunity of seeing the witnesses and of weighing their testimony as it is delivered orally, the finding of such court on mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, to suggest, unless such findings are clearly and manifestly against the preponderance of evidence."

Under the circumstances of the case, believing that the trial judge has in a much better position to determine the single question of credibility than we are, we are of the opinion that the judgment must stand.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

(74a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

214 I.A. 672

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6607. Agenda 2.

A Weinberg,
Appellee,
-vs-
Chicago & North Western Railway Company, a railroad corporation,
Appellant.

Appeal from circuit court Winnebago county.

Niehaus, P.J.

In this case A. Weinberg, the appellee, commenced suit against the Pere Marquette Railroad Company and the appellant, Chicago & Northwestern Railroad Company, in the circuit court of Winnebago county to recover damages he claims to have sustained from the freezing of a car load of apples in transporting them from Chicago to Rockford on appellant's railroad/ The apples were packed in barrels, and had originally been shipped from Portland, Michigan, to Albert Miller & Co., at Chicago, Illinois, and on the 20th day of December, 1909, were in a refrigerator car, which was standing on the tracks of the Pere Marquette Railroad in Chicago. On the day mentioned they were purchased by the appellee from Albert Miller & Co., to whom they had been consigned, and were then re-consigned by Albert Miller & Co., for shipment to Rockford to be delivered to the appellee. The proof shows that a bill of lading was issued for this shipment on December 21,1909, by the Pere Marquette Railroad Company, and the shipment was by that company delivered to the appellant on the 22nd of December; but it did not reach Rockford until December 24th, when it was discovered on opening the car containing the apples that they were frozen. The appellee took the apples in the damaged condition in which they were found and sold them in the

Gen. No. 6607. Agenda 2.

A Weinberg,

Appellee,

-vs-

Appeal from circuit court
Winnebago county.

Chicago & Northwestern
Railway Company, a railroad
corporation,

Appellant.

Mr. Justice Farmer delivered the opinion of the court:

In this case A. Weinberg, the appellee, commenced suit against the Pere Marquette Railroad Company and the appellant, Chicago & Northwestern Railroad Company, in the circuit court of Winnebago county to recover damages he claims to have sustained from the freezing of a car load of apples in transporting them from Chicago to Rockford on appellant's railroad. The apples were packed in barrels, and had originally been shipped from Portland, Michigan, to Albert Miller & Co., at Chicago, Illinois, and on the 30th day of December, 1909, were in a refrigerator car, which was standing on the tracks of the Pere Marquette Railroad in Chicago. On the day mentioned they were purchased by the appellee from Albert Miller & Co., to whom they had been consigned, and were then re-consigned by Albert Miller & Co., for shipment to Rockford to be delivered to the appellee. The proof shows that a bill of lading was issued for this shipment on December 31, 1909, by the Pere Marquette Railroad Company, and the shipment was by that company delivered to the appellant on the 32nd of December; but it did not reach Rockford until January 24th, when it was discovered on opening the car containing the apples that they were frozen. The appellee took the apples in the damaged condition in which they were found and sold them in the

market for what he could obtain for them, and realized $165,33 but the cost of handling the apples was $40.00, making a net salvage of $125.33. The evidence also tends to show that the value of the apples at Rockford, if they had not been frozen, was about $536.00 at that time. There was a trial by jury which resulted in a verdict for the appellee and against the appellant for the sum of $410.92. The defendant Pere Marquette Railroad Company, was found not guilty. The appellant made a motion for a new trial for certain specific reasons, which was overruled, and the court thereupon rendered judgment on the verdict against the appellant for $467.19 and costs of suit; and from this judgment an appeal is prosecuted.

One of the grounds argued by appellant for a reversal of the judgment is that the evidence does not sustain the verdict; and it is insisted that the evidence shows that the apples were frozen in Chicago before they were delivered to the appellant for shipment to Rockford. There is some evidence tending to show this to be a fact; an official report of the track foreman of the Pere Marquette Railroad Company at Chicago to the Pere Marquette Railroad Company was in evidence concerning the condition of six cars of apples, consigned to A.Miller & Co., including the car in question, to the effect that the apples in these six cars then in the Pere Marquette Railroad yards were more or less frozen. On the other hand the evidence of the appellee and another witness by the name of Gordon, who was with the appellee in Chicago on the day that the apples were purchased by appellee, is to the effect that they inspected the apples

market for what he could obtain for them, and realized $[illegible],30 but the cost of handling the apples was $40.00, making a net salvage of $[illegible]. The evidence also tends to show that the value of the apples at Chicago, if they had not been frozen, was about $[illegible] at that time. There was a trial by jury which resulted in a verdict for the appellee and against the appellant for the sum of $[illegible]. The defendant's contention, Illinois Company, was found not guilty. The appellant made a motion for a new trial for certain specific reasons, which was overruled, and the court thereupon rendered judgment on the verdict and the appellant, within [illegible] days after, filed its bill of exceptions; and from this judgment an appeal is prosecuted.

One of the grounds argued by appellant for a reversal of the judgment is that the evidence does not sustain the verdict; and it is insisted that the evidence shows that the apples were frozen in Chicago before they were delivered to the appellant for shipment to Europe. There is some evidence tending to show this to be a fact; an official report of the track foreman of the Pere Marquette Railroad Company at Chicago to the Pere Marquette Railroad Company was in evidence concerning the condition of six cars of apples, consigned to [illegible] & Co., including the car in question, to the effect that the apples in these six cars then in the Pere Marquette Railroad yards were more or less frozen. On the other hand the evidence of the appellee and another witness by the name of Dodson, who was with the apples in Chicago on the day that the apples were purchased by appellee, is to the effect that they inspected the apples

in the particular car in question on that day prior to the purchase of them by the appellee, and found that the apples were not frozen but sound and in good condition; furthermore, that there was an oil stove in this car, which was heating the car, and that the car was warm and comfortable. The bill of lading which was issued by the Pere Marquette Railroad for re-shipment of the apples recites that the apples were received by that company in apparent good order. In this state of the proof this court would not be warranted in holding that the evidence does not sustain the verdict. On the contrary, the evidence referred to made a prima facie case for appellee, and the burden of proof was then shifted to the appellant, and it was encumbent on the appellant to prove that the apples were already in the damaged condition in which they were found at the destination when it received the shipment at Chicago for transportation to Rockford. Illinois Central R.R.Co.,v.Cobb B.& Co.,72 Ill.148; Bissell v Price, 16 Ill.408;Great Western R.R.Co.,v.McDonald, 18 Ill.72; L.S.& M.S.Ry.Co., v.Live Stock Bank, 178 Ill.506; Peoria Packing Co.,v.N.C.& St.L.Ry.Co.,164 Ill.App.646; Ruddell v. B.& O.R.R.Co., 175 Ill.App.456; Painsinski v.Illinois Central R.R.Co.165 Ill.App.556; Mexican Import Co.,v.Penn.R.R. Co. 193 Ill.App.26. It is evident that the jury did not deem appellant's proof as to the condition of the apples when it received them from the Pere Marquette Railroad at Chicago for shipment to Rockford as sufficient to overcome the prima facie case made out by the appellee; and we cannot say that they should have reached a different conclusion.

in the particular car in question on that day prior to the purchase of them by the plaintiff, and found that the apples were not frozen but sound and in good condition; furthermore, that there was no oil stove in this car, which was heating the car, and that the car was warmed and habitable. The bill of lading which was issued by the Atlantic Refrigerator Railroad for re-shipment of the apples recites that the apples were received by that company in apparent good order. In this state of the record this court would not be warranted in holding that the evidence does not sustain the verdict. On the contrary, the evidence referred to made a prima facie case for appellee, and no further of proof was then shifted to the appellant, and it was encumbent on the appellant to prove that the apples were already in the damaged condition in which they were found at the destination when it received the shipment at Chicago for transportation to Rockford. Illinois Central R.R.Co.,v.Cobb S.L.Co.,75 Ill.146; Sherell v Price, 16 Ill.402;Great Eastern R.Co.,v.Salomon 16 Ill.75; L.E.& S.R.Ry.Co., v.Live Stock Bank, 175 Ill.306; Pecoria Packing Co.,v.N.C.& St.L.Ry.Co.,101 Ill.App.642; Mudsall v. L.& N.R.Co., 175 Ill.App.496; Pittsburgh v.Illinois Central R.R.Co.,182 Ill.App.300; Swift Lumber Co.,v.Pere M.R. Co. 182 Ill.App.36. It is evident that the jury did not deem appellee's proof as to the condition of the apples when it received them from the Pere Marquette Railroad at Chicago for shipment to Rockford as sufficient to overcome the prima facie case made out by the appellee; and we cannot say that any court would have reached a different conclusion.

It is contended that the court erred in its refusal to admit in evidence a letter purporting to have been written on December 18,1909, addressed to C.Harsch, agent of the Pere Marquette R.R.Co., by A.Miller & Co., which recites that Albert Miller of that firm had inspected the apples in the car in question and upon such inspection found that they were more or less frozen, It is insisted by the appellant that the letter embodying this statement of Miller concerning the condition of the apples was competent because it was in the nature of a statement by former owner of the property derogatory to the title. It is apparent however that this letter was not admissible. It appears on the face of the letter that it must have been written at the instance of Albert Miller & Co., having in view a possible claim for damages against the Pere Marquette R.R.Co., on account of the apples referred to, and therefore clearly self-serving. It was not a statement in any sense concerning the title of Albert Miller & Co., to the property in question, because the title of the property was not involved; it had reference solely to the condition of the property. The recitals in the letter are merely the hearsay assertion of the writer of the letter as to what Miller had reported concerning the condition of the apples at the time they were in the Pere Marquette Railroad yards. The result of Miller's inspection to be admissible as evidence should have been offered in the form of testimony by Miller himself under oath, either on the witness stand or in a deposition taken in conformity to law, so that the adverse party could have had an opportunity of crossexamination. Hately v.Kiser,253 Ill.288;

It is contended that the court erred in its refusal to admit in evidence a letter purporting to have been written on December 15,1909, addressed to C.Barnes, agent of the Fore Enterprise R. Co., by Miller & Co., which recites that Albert Miller of that firm had inspected the supplies in the car in question and upon such inspection found that they were more or less frozen. It is insisted by the appellant that the letter embodying this statement of Miller concerning the condition of the supplies was competent because it was in the nature of a statement by former owner of the property derogatory to the title. It is apparent however that this letter was not admissible. It appears on the face of the letter that it must have been written at the instance of Albert Miller & Co., having in view a possible claim for damages against the Fore Enterprise R.R.Co., on account of the supplies referred to, and therefore clearly self-serving. It was not a statement in my case concerning the title of Albert Miller & Co., to the property in question, because the title of the property was not involved; it had reference solely to the condition of the property. The result is in the letter are merely the hearsay assertion of the writer of the letter as to what Miller had reported concerning the condition of the supplies at the time they were in the Fore Enterprise Railroad yards. The result of Miller's inspection to be admissible as evidence should have been offered in the form of testimony by Miller himself under oath, either on the witness stand or in a deposition taken in uniformity to law, so that the adverse party could have had an opportunity of cross-examination. Bailey v.Kirk,[illegible]

Chamberlain v.Chamberlain, 116 Ill.480; Capon v.DeSteiger Glass Co., 105 Ill.185; I.C.R.R.Co.v.Cobb B,& Co.,72 Ill.148; Winslow v. Newlan, 45 Ill.145.

The complainant complains that it was prejudiced by a question asked on cross examination by the counsel for appellee who was interrogating the witness Monaghan. The question pur to the witness was: " The Pere Marquette Railroad Company is in the hands of a receiver, is it not?" An objection was made to the question and sustained by the court. But it is claimed that the mere asking of the question resulted prejudicially to the appellant. We are unable to view the matter in that light, and cannot perceive how the asking of the question could have had any effect on the jury in passing on the issues in the case; but the appellant by introducing in evidence Exhibit 1 brought into the case the very fact that it sought to exclude from the jury by its objection to the question above stated; so it is not in position to complain on that account.

The appellant also insists that the giving of the 4th instruction for appellee was error. We are of opinion that the instruction correctly states the law from the standpoint of the plaintiff, and that furthermore, it must be considered in connection with instructions numbered 1,2,3,5,7, and 10, given for the appellant concerning the same matter, which state the law from the standpoint of the defense. The instructions when considered altogether as they should be, could not have misled the jury into any erroneous conclusions concerning the law applicable to the case.

Chamberlain v. Chamberlain, 118 III. 499; Cogen v. Lestiger Plow Co., 103 III. 180; I.C.R.R. Co. v. Toft 1 B.A. Co., 71 III. 146; Hinkle v. Rowlan, 60 III. 140.

The complainant complains that it was prejudiced by a question asked on cross examination by the counsel for appellee who was interrogating the witness Longwell. The question put to the witness was: "The Pure Magnetic Infirmed Company is in the hands of a receiver, is it not?" An objection was made to the question and sustained by the court. But it is claimed that the mere asking of the question resulted prejudicially to the appellant. We are unable to view the matter in that light, and cannot perceive how the asking of the question could have had any effect on the jury in passing on the issues in the case; but the appellant by introducing in evidence Exhibit I brought into the case the very fact that it sought to exclude from the jury by its objection to the question above stated; so it is not in position to complain on that ground.

The appellant also insists that the giving of the 4th instruction for appellee was error. We are of opinion that the instruction correctly states the law from the standpoint of the pleadings, and that furthermore, it must be considered in connection with instructions numbered 1, 2, 3, 7, and 12, given for the appellant concerning the same matter, which state the law from the standpoint of the defense. The instructions when considered altogether as they should be, could not have misled the jury into any erroneous conclusions concerning the law applicable to the case.

Another point for the reversal of the judgment urged by appellant is, that the verdict is based on the assumption that there were 164 barrels of apples in the shipment when as a matter of fact there were but 160 barrels, and that therefore the damages found are evidently too large. It is sufficient to say concerning this contention that it was not specified among the reasons enumerated in the motion for a new trial and is therefore considered waived, and is not available to appellant as a ground for reversal of the judgment. Knights Templars Idem.Co.,v.Crayton, 209 Ill.550; Landt V.McCullough,206 Ill.214; I.C.R.R.Co.V.Johnson 191 Ill.594; West Chicago St.R.R.Co. v. Krueger, 168 Ill. 586.

The record does not disclose any reversible error and the judgment is affirmed.

Another point for the approval of the judgment appeals by appellant is, that the verdict is based on the assumption that there were 100 barrels of apples in the shipment when a matter of fact there were but 100 barrels, so that therefore the damages found are grossly too large. It is sufficient to say concerning this contention that it was not specifically among the reasons enumerated in the motion for a new trial and is therefore considered waived, and is not available to appellant as a ground for reversal of the judgment. Knight Troupe Ins.Co.,v.Grayson, 300 Ill.200; Lucas V.Lockhlongh,300 Ill.314; I.C.R.R.Co.V.Adams 177 Ill.[illegible]; West Chicago St.R.Co. v. Kreuger, 166 Ill. 332.

The record does not disclose any reversible error and the judgment is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6620

(732)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

214 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Certiorari allowed

Gen. No.6650. Agenda 6.

Alvin Sullivan,

Defendant in Error,

-vs-

Wm.Ohlhaver Company,
a corporation,

Plaintiff in Error.

Writ of error to circuit court, Kane county.

Nichaus, P. J.

This suit was brought in the circuit court of Kane county by the defendant in error, Alvin Sullivan, to recover damages alleged to have been sustained by him for personal injuries which he suffered in consequence of a collision which occurred between the automobile truck of the plaintiff in error, William Ohlhaver Company, and the automobile of James Feece, who was also made defendant in the suit. The collision occurred about seven thirty o'clock in the evening on the 2nd day of May, 1917, on LaSalle Street in the city of Aurora. The defendant in error had parked his automobile next to the west curb on La Salle street, facing south. The Feece automobile also stood next to the west curb about five feet to the rear of the car of the defendant in error, facing in the same direction. At the time of the collision the defendant in error was standing in the rear of his machine lighting the tail light. The Feece automobile had just turned out into the street as the truck of the plaintiff in error came along on the west side of the street and violently collided with the Feece auto, pushing it against the defendant in error, and seriously injuring him.

Det. No.8830. Legend 6.

Alvin Sullivan,

Defendant in Error,

-vs-

Suit on error to
Local Court.
Dent County.

Ma.Gulaway Company,
a corporation,

Plaintiff in Error.

Lightner, J. A.

This suit was brought in the district court of Dent county by the defendant in error, Alvin Sullivan, to recover damages alleged to have been sustained by him for personal injuries which he claimed in consequence of a collision which occurred between the automobile truck of the plaintiff in error, Gulaway Gulf Company, and the automobile of James Dunn, who was also made defendant in the suit. The collision occurred about seven ten by o'clock in the evening on the 2nd day of May, 1917, on Lafayette Street in the city of Aurora. The defendant in error had parked his automobile next to the west curb of Lafayette Street, facing north. The Dunn automobile also was parked on the west curb about five feet to the rear of the car of the defendant in error, facing in the same direction. At the time of the collision the defendant in error was sitting in the rear of his machine lighting the tail light. The Dunn automobile had just turned out into the street to the right of the plaintiff in error came along on the west side of the street and violently collided with the Dunn auto, pushing it against the defendant in error, and seriously injuring him.

The declaration alleges the negligence of the plaintiff in error, which resulted in the injuries to the defendant in error, to be in the management and operation of its truck; that the truck was run in violation of the speed laws and at an unreasonable rate of speed, and on that account ran into the Feece automobile as it turned into the street. It also alleges that the view of the driver of the truck was obstructed by the negligent placing of a piece of convas or cloth on the glass front of the machine so that the driver's view was thereby obstructed, and that that interferred with the driver in seeing an auto turning out into the street; also that the defendent, James Feece, was negligent by not giving warning of his intention to turn his auto into the street by raising a hand to indicate such intention as required by the ordinances of the city of Aurora. The defendant Feece obtained a severance and separate trial, so these proceedings pertain only to issues raised between the defendant in error and the plaintiff in error. There was a trial by jury which resulted in a verdict against the plaintiff in error and damages in the sum of $8000.00, upon which judgment was rendered, and a writ of error is now prosecuted to reverse this judgment.

A preliminary question was raised in this case by motion to strike the bill of exceptions from the record because it is claimed that it was not signed or filed within the ninety day period required by the order of the court. It appears, however, from the record, that it was presented to the trial judge July 6th, 1918, which was at least thirty days prior to the expiration of the ninety day period, and then afterwards on October 29th, 1918,

[illegible]

[illegible]

[illegible]

signed by the judge as of July 6th,1918, and ordered filed as of July 6th,1918, nunc pro tunc. This meets the requirements of the law concerning the signing, sealing and filing of the bill of exceptions. "It is settled by numerous decisions that if a bill exceptions is presented to the trial judge at such time that it can be filed within the time allowed by the order of the court, if it is then signed and sealed the party presenting it will not be prejudiced by any delay or neglect of the court. If the date of presentation appears on the bill, an order may be made whenever it is afterwards signed and sealed, to file it nunc pro tunc as of the date of such presentation to the judge." Hawes v.People, 129 Ill.123; Ferris v.Commercial Nat.Bank,158 Ill.237; West Chicago Street R. Co.,v.Mirrison A & A Co., 160 Ill. 288; Hall v. Royal Neighbors, 231 Ill. 165. The motion by defendant in error to strike the bill of exceptions from the record is therefore denied.

While the evidence is somewhat conflicting it fairly tends to show that at the time of the injury to the defendant in error the delivery truck of the plaintiff in error was running along La Salle Street in the business section of the City of Aurora in violation of the speed laws; at least, the jury were warranted in reaching this conclusion from the evidence; that in consequence of the high rate of speed it collided with the Feece automobile with great force and pushed it over against the defendant in error, thereby causing the injury complained of. The evidence also fairly tends to show that the view of the driver of the truck at the time it was running on La Salle Street was

signed by the judge on the 1st July 6th,1910. and ordered filed on the 1st July 6th,1910, nunc pro tunc. This meets the requirements of the law concerning [illegible] signing and filing of the bill of exceptions. It is settled by numerous decisions that if a bill of exceptions is presented to the trial judge at such time that it can be filed within the time allowed by the rules of the court, it is his duty to sign and seal the party presenting it will not be prejudiced by any delay or neglect of the court. If the time of presentation appears on the bill, an order may be made whenever it is afterwards [illegible], to file it nunc pro tunc as of the date of such presentation and the judge. [illegible] 120 Ill.120; Forrest v. Commercial Nat.Bank,128 Ill.537; Best Blouse Street Co.v.Stratton & Co., 140 Ill. [illegible]; Hall v. Royal Neighbor, [illegible] Ill. [illegible]. The action by defendant in error to strike the bill of exceptions from the record is therefore denied.

[illegible] the evidence by somewhat modifying it briefly [illegible] the time of the injury to the defendant in error [illegible] driver of the plaintiff in error was running along [illegible] in the business affairs of the city of [illegible] in violation of the speed laws; at least, the jury were warranted in [illegible] the conclusion from the evidence; that [illegible] of the high rate of speed it collided with the [illegible] with great force and pushed it over [illegible] in error, thereby causing the injury complained of. [illegible] also fairly taken to mean that the car of the driver of [illegible] at the time it was running on the Belle Street

to some extent at least, obstructed by canvas which had been placed on one side of the wind shield of the truck and that he did not on that account have as clear a view of the street as he should have had, so as to be able to clearly see the side of the street from which the Feece machine turned into the street. It is contended by plaintiff in error that the sudden turning into the street by the Feece automobile without giving any warning as required by the city ordinance, was the intervention of an independent cause which relieved the plaintiff in error of the result of any negligence it might have been guilty of; and that the act of Feece in turning his automobile out in the street in violation of the city ordinance, was really the proximate cause of the injury. We are unable to view the matter in the light of this contention. The proof shows that the injury resulted from the concurrent acts of both parties; and it is reasonable to assume from the evidence that if the delivery truck of the plaintiff in error had come along La Salle Street at the slow rate of speed which plaintiff in error contends for, it would not have reached the Feece automobile at the time it turned into the street; and furthermore, even if it had reached it, it would not have caused a collision of such violence and force as to have pushed the Feece automobile over against the defendant in error. The jury were therefore fully justified in reaching the conclusion that the injury to the defendant in error directly resulted from the speed at which the truck was running, and if so, it must be regarded as the direct or proximate cause of the injuries to the defendant in error.

to some extent at least, obstructed by trees which had been
placed on one side of the wide middle of the street, and that he
did not on that account have a clear view of the street as he
should have had, so as to enable him to clearly see the side of the
street from which the locomotive turned into the street.
It is contended by plaintiff in error that the engineer turning
into the street by the horse-and-buggy without giving any
warning as required by the city ordinance, was the intervention
of an independent cause which relieved the plaintiff in error
of the result of any negligence it might have been guilty of;
and that the engineer in turning the locomotive out in the
street in violation of the city ordinance, was really the proxi-
mate cause of the injury. In our view it is not in
the light of this contention. The proof shows that the injury
resulted from the concurrent acts of both parties; and it is
reasonable to assume from the evidence that if the delivery truck
of the plaintiff in error had come along in Ellis Street at the
slow rate of speed which plaintiff in error contends for, it would
not have reached the crossing at the time it turned into
the street and from the locomotive, and if it had reached it, it would
not have caused a collision of such violence and force as to have
placed the locomotive completely over against the delivery in error.
The jury were therefore clearly justified in regarding the violation
of the city ordinance in the manner in which it was done, as
the proximate cause of the injury directly resulting from
the speed at which the truck was running, and if so, it must be
regarded as the direct and proximate cause of the injuries to the
plaintiff in error.

The plaintiff in error also contends, as a ground for reversal of the judgment, that the court erroneously admitted in evidence a statement made by the president of the plaintiff in error company, to a witness, which was in effect an admission that there was a curtain on the wind shield of the truck and that it was put there to keep the rain out. We are of opinion, that this evidence was competent under the issue raised by the allegation in the declaration concerning the obstruction of the driver's view, which it is alleged in the declaration had been negligently placed on the wind shield of the truck. But the evidence is at most, only cumulative, inasmuch as there was other evidence in the case to show that a piece of canvas had been placed on the wind shield of the truck;aand the introduction of this evidence, even if erroneously admitted, could not, therefore, be regarded as reversible error.

It is also contended that one of the instructions which plaintiff in error requested to be given was refused, and that such refusal was error. The abstract does not show at whose instance any of the instructions were given, nor who requested the instructions to be given which were refused. The plaintiff in error is, therefore, not in position to ask this court to consider questions arising from a refusal of instructions. We have examined the instruction referred, however, and are of opinion that it was properly refused because it did not properly apply to any controverted question in the case arising between the plaintiff in error and the defendant in error.

The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.

The plaintiff in error also contends, as a ground for reversal of the judgment, that the court improperly admitted in evidence a statement made by the president of the plaintiff in error company, but it does, which was in effect a statement that there was a mortgage on the car which covered the truck and that it was put there in lieu of the main one. We are of opinion, that this evidence was admissible under the decisions relied by the plaintiff in error, which have allowed in the association had been negligently placed on the wrong detail of the truck. But the evidence is not, in our opinion, immaterial. There was other evidence in the case to show that a prior mortgage had been placed on the wrong detail of the transmission association of this evidence, even if erroneously admitted, would not, therefore, be regarded as reversible error.

It is also contended that one of the instructions which plaintiff in error requested to be given was refused, and that such refusal was error. The instruction does not show at what stage of the instruction was given, nor what requested the instruction to be given which was refused. The plaintiff in error is, therefore, not in a position to complain of the refusal of the instruction. In a proper case the instruction, however, would be a proper one, requiring the jury to find, however, [illegible] plaintiff in error and the defendant in error, [illegible] the plaintiff in error and the defendant in error.

[illegible] requires no [illegible] for a verdict either, [illegible] in favor of the defendant in error.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6669

(676a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

214 I.A. 672 4

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen.No. 6659

Lillian Ash, appellee

vs Appeal from Peoria.

Blanche I. Laukhuf, et al

appellants.

Niehaus, P. J.

In this case an appeal is prosecuted from a decree of the circuit court of Peoria County appointing a receiver to take possession of the premises involved in a foreclosure proceeding, to collect the rents and profits arising therefrom during the period of redemption, and apply the same upon the deficiency arising from a foreclosure sale. It appears from the record that the appellee Lillian Ash had filed a bill in equity to foreclose a trust deed made by Blanche I Laukhuf and Christian R. Laukhuf to John Wisnor, trustee, to secure a note of $3,000 held by the appellee; the property involved consisted of a house and a lot in the city of Peoria, which was tenanted by Annie Stauffer and the Central Illinois Light Company. All the parties mentioned including the trustee were made parties defendant in the bill. The suit was brought to the September Term 1918 and at the following November term the appellant Charles A. Kimmel obtained leave of court to intervene, but he filed an answer setting up that after the commencement of the foreclosure proceedings he had become the owner of the equity of redemption of the property involved by virtue of a deed from Blanche I Laukhuf and her husband. All the defendants except Charles A. Kimmel and Central Illinois Light Company were defaulted. The case was referred to the master, who found that the appellee was entitled to a decree of foreclosure and that the amount due her was $3369.50. The master's report was confirmed by the court, and a decree of foreclosure and sale was entered, under which the premises were sold by the

Gen.No. 6858

Lillian Ash, appellee

vs. Appeal from Peoria.

Simonne I. Lawhhuf, et al

Appellants.

Mishawa, P. J.

In this case an appeal is prosecuted from a decree of the circuit court of Peoria County appointing a receiver to take possession of the premises involved in a foreclosure proceeding, to collect the rents and profits arising therefrom during the period of redemption, and apply the same upon the deficiency arising from a foreclosure sale. It appears from the record that the appellee Lillian Ash had filed a bill in equity to foreclose a trust deed made by Simonne I Lawhhuf and Christian H. Lawhhuf to John Wisner, trustee, to secure a note of $4,000 held by the appellee; the property involved consisted of a house and a lot in the city of Peoria, which was tenanted by Annie Shaulter and the Central Illinois Light Company. All the parties mentioned including the trustee were made parties defendant in the bill. The suit was brought to the September Term 1912 and at the following November term the appellant Charles A. Kimmel obtained leave of court to intervene, but he filed an answer setting up that after the commencement of the foreclosure proceedings he had become the owner of the equity of redemption of the property involved by virtue of a deed from Simonne I Lawhhuf and her husband. All the defendants except Charles A. Kimmel and Central Illinois Light Company were defaulted. The case was referred to the master, who found that the appellee was entitled to a decree of foreclosure and that the amount due her was $4000.00. The master's report was confirmed by the court, and a decree of foreclosure and sale was entered, under which the premises were sold by the

master for $500.00leaving a deficiency of $1834.19. The Trust Deed which is the basis of the foreclosure proceedings contains the following clause concerning the foreclosure sale and the appointment of a receiver: "And in case the proceeds of such sale shall not be sufficient to satisfy in full the amount of such decree, the Court may appoint a receiver to take possession of said premises and use or rent the same during the period of redemption, and apply the rents and profits toward the payment of such deficit, until the same is fully paid." The appellee filed her petition duly verified, for the appointment of a receiver, under the clause in the trust deed referred to, and upon due notice to all the parties in interest, and by agreement between the appellant and the appellee, the matter of the appointment of a receiver was set down for a hearing and after a hearing of the matter the court made the following finding in the decree:

"And this cause coming on now further to be heard upon the petition of the complainant for the appointment of a Receiver to take possession of the premises involved in said foreclosure proceedings, and the court having fully examined the proceedings herein and heard the arguments of counsel and being fully advised in the premises and it appearing to the court that the said trust deed mentioned in the Bill of Complaint herein contained a clause providing that in case of the sale of the said mortgaged premises under deccee of court, and in case the proceeds of such sale should not be sufficient to satisfy ~~the full~~ in full the amount found to be due under such trust deed, the Court might appoint a receiver to take possession of said premises and rent or use the same during the period of redemption and apply the rents and profits toward the payment of such deficit, until the same is fully paid, and it appearing to the court that all parties in interest entitled to notice of the hearing by the Court of the petition of

master for $BPC. Observing a deficiency of $1824.16. The Trust Deed which is the basis of the foreclosure proceedings contains the following clause concerning the foreclosure sale and the appointment of a receiver: "And in case the proceeds of such sale shall not be sufficient to satisfy in full the amount of such decree, the Court may also point a receiver to take possession of said premises and use or rent the same during the period of redemption, and apply the rents and profits toward the payment of such deficit, until the same is fully paid." The appellee filed her petition duly verified, for the appointment of a receiver, under the clause in the trust deed referred to, and upon the notice to all the parties in interest, and by agreement between the appellant and the appellee, the matter of the appointment of a receiver was set down for a hearing and after a hearing of the matter the court made the following finding in the decree:

"And this cause coming on now further to be heard upon the petition of the complainant for the appointment of a receiver to take possession of the premises involved in said foreclosure proceedings, and the court having fully examined the proceedings herein and heard the arguments of counsel and being fully advised in the premises and it appearing to the court that the said trust deed mentioned in the Bill of Complaint herein contained a clause providing that in case of the sale of the said mortgaged premises under decree of court, and in case the proceeds of such sale should not be sufficient to satisfy xxx xxxx in full the amount found to be due under such trust deed, the Court may appoint a receiver to take possession of said premises and rent or use the same during the period of redemption and apply the rents and profits toward the payment of such deficit, until the same is fully paid, and it appearing to the court that all parties in interest entitled to notice of the hearing by the Court of the petition of

the complainant for appointment of a Receiver herein, have received due notice of such hearing, and it also appearing to the court upon full hearing of this cause that good cause has been shown to the court why the petitioner, Lillian Ash, should not file a bond as provided by the statute in such case made and provided, and the Court being of the opinion that a Receiver should be appointed herein without the filing of such bond, it is therefore ordered by the court that the petitioner need not file such bond."

The appellant contends that the legal prerequisites for the appointment of a receiver in this case were lacking because there was no showing that the mortgaged premises was scant security for the mortgage debt. It appears that the mortgage in question was a second mortgage, and that the premises had already been sold to satisfy prior liens for the sum of $6069.56; and that the sale in this proceeding was really a sale of the equity of redemption. The fact that only $500 could be realized under the second sale is of itself evidence to show that the trust deed for the property involved was scant security for the indebtedness due the appellee. Ruprecht v Henrici 116 Ill. App. 583. However the exact situation was presented to the court which made the clause in the trust deed which authorized the appointment of a receiver to collect rents and profits upon foreclosure effective, for it amounts to a mortgage of the rents and profits accruing from the premises until the expiration of the period of redemption. Townsend v Wilson 155 Ill App 503; First National Bank v Illinois Steel Co. 174 Ill. 140; Oakford v Robinson 48 Ill. App. 270; Howard v Burns 201 Ill. App. 583, affirmed in 279 Ill. 356; Owsley v Neeves 179 Ill. App. 61. Where there is a deficiency arising from a foreclosure sale, and the mortgage pledges the rents, issues and profits to the

the complainant for appointment of a receiver herein, have received the notice of such hearing, and it also appearing to the court upon full hearing of this cause that good cause has been shown to the court why the petitioner, William Ash, should not file a bond be required by the statute in such case made and provided, and the Court being of the opinion that a Receiver should be appointed herein without the filing of such bond, it is therefore ordered by the court that the petitioner need not file such bond."

The appellant contends that the legal proceedings for the appointment of a receiver in this case were lacking because there was no showing that the mortgaged premises was bond security for the mortgage debt. It appears that the mortgage in question was a second mortgage, and that the premises had already been sold to satisfy prior mortgage liens for the sum of $[illegible]; and that the sale in this proceeding was really a sale of the equity of redemption. The fact that only $[illegible] could be realized under the second sale is of itself evidence to show that the real debt for the property involved was bond security for the indebtedness due the appellee. Burnett v Merrill 112 Ill. App. 183. However the exact situation was presented to the court when said the clause in the trust deed which authorized the appointment of a receiver to collect rents and profits upon foreclosure effective, for it secures to a mortgage of the rents and profits accruing from the premises until the expiration of the period of redemption. Tuesday v Wilson 182 Ill 4 p 209; First National Bank v Illinois Steel Co. 174 Ill. 180; Gaylord v Robinson 44 Ill. App. 190; Sweet v Byrne 201 Ill. App. 283, affirmed in 272 Ill. 352; Dewey v Reeves 172 Ill. App. 83. Where there is a deficiency arising from a foreclosure sale, and the mortgage pledges the rents, issues and profits to the

payment of such deficiency, it is proper to appoint a receiver for that purpose. Ball v Marske, 202 Ill. 31; Bagley v Ill. Tr & Sav. Bank 199 Ill. 76; First National Bank v Illinois Steel Co. supra.

It is also contended by the appellant that under Section 53 of Chapter 22 of the revised statutes which requires, that before a receiver is appointed the party making the application shall give bond unless for good cause shown upon notice and full hearing the court should be of opinion that a receiver should be appointed without bond; and that the reason for making the appointment without such bond should appear in the order of the court appointing such receiver. We are of opinion that the recitals in the decree comply with the requirements of the statute for the appointment of a receiver without requiring the bond referred to in Section 53. It appears from these recitals that there was a deficiency and that a receiver was appointed upon notice and a full hearing of the matter. The deficiency under the provisions of the trust deed authorizing the application of the rents to the payment of such deficiency, was a sufficient showing and good cause for dispensing with the bond in question and fully warranted the court in reaching the conclusion that the appointment should be made without requiring such a bond. Watson v Cudney 144 Ill. App. 624; Ayres v The Graham Steam Ship Coal & L. Co. 150 Ill. App. 137. Haveman v Rizek, 160 Ill. App. 648; John Spry L. Co. v Hardin, 172 Ill. App. 86; Fluke v Phelps 177 Ill. App. 95; Schoenecke v Chicago T. & T. Co. 178 Ill. App. 387.

The record does not disclose any error in the appointment of a receiver in this case, and the decree is therefore affirmed.

Decree affirmed.

payment of such deficiency, it is proper to appoint a receiver for that purpose. Earl v Marks, 202 Ill. 41; Begley v Ill. Tr & Sav. Bank 182 Ill. 79; First National Bank v Illinois Steel Co. supra.

It is also contended by the appellant that under Section 53 of Chapter 32 of the revised statutes which requires, that before a receiver is appointed the party making the application shall give bond unless for good cause shown upon notice and full hearing the court should be of opinion that a receiver should be appointed without such bond, and that the reason for making the appointment without such bond should appear in the order of the court appointing such receiver. We are of opinion that the requisite in the latter comply with the requirements of the statute for the appointment of a receiver without requiring the bond referred to in Section 53. It appears from these recitals that there was a deficiency and that a receiver was appointed upon notice and a full hearing of the matter. The deficiency under the provisions of the trust deed authorizing the application of the rents to the payment of such deficiency, was a sufficient showing and good cause for dispensing with the bond in question and fully warranted the court in reaching the conclusion that the appointment should be made without requiring such a bond.

Watson v Cahey 164 Ill. App. 534; Ayres v The Chicago Steam Ship Coal & L. Co. 180 Ill. App. 187. Hansen v Hinck, 180 Ill. App. 648; John Jury L. Co. v Martin, 174 Ill. App. 88; Tuke v Phelps 177 Ill. App. 88; Wakeneis v Chicago T. & T. Co. 172 Ill. App. 587.

The record does not disclose any error in the appointment of a receiver in this case, and the order is therefore affirmed.

Decree affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6669

(677a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

214 I.A. 672

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No.6669. Agenda 17.

Eli McNames,
Appellee,
-vs-
Eli Smith,
Appellant.

Appeal from circuit court,
Winnebago county.

Niehaus, P.J.

In this case the appellee, Eli McNames, brought suit against Eli Smith, the appellant, in the circuit court of Winnebago county, to recover commissions which he claimed to be entitled to for making sale as agent of the appellant, of a certain farm consisting of 320 acres of land in Winnebago county. The appellee claims to have made a contract with the appellant by which he was to receive 2 per cent. commissions on the purchase price of the farm if he found a purchaser for the farm at $200.00 per acre. The appellant does not deny that the appellee found a purchaser, and brought about the sale of the farm, but insists that the contract between them as to the 2 per cent. commission was to the effect the appellee was to receive such commission only in case the farm was sold for cash; that if a trade were made his commission was to be $500.00. There was a trial by jury, which resulted in a verdict in favor of the appellee fixing the amount due him at $950.00. At the instance of the court the plaintiff remitted $110.00 of the amount found by the jury, and the court thereupon rendered judgment for $840.00; and the appellant prosecutes this appeal from the judgment.

Gen. No.6663. Agenda IV.

Eli McNamee,
Appellee,
-vs-
Eli Smith,
Appellant.

Appeal from circuit court,
Winnebago county.

Mielzner, J.d.

In this case the appellee, Eli McNamee, brought suit against Eli Smith, the appellant, in the circuit court of Winnebago county, to recover commissions which he claims to be entitled to for making sale as agent of the appellant, of a certain farm consisting of 320 acres of land in Winnebago county. The appellee claims to have made a contract with the appellant by which he was to receive 3 per cent. commissions on the purchase price of the farm if he found a purchaser for the farm at $100.00 an per acre. The appellant does not deny that the appellee found a purchaser, and brought about the sale of the farm, but insists that the contract between them was to the 3 per cent. commission was to the effect the appellee was to receive such commission only in case the farm was sold for cash; that if a trade were made his commission was to be $300.00. There was a trial by jury, which resulted in a verdict in favor of the appellee fixing the amount due him at $300.00. At the instance of the court the plaintiff remitted $110.00 of the amount found by the jury, and the court thereupon rendered judgment for $190.00; and the appellant prosecutes this appeal from the judgment.

It is contended by the appellant that the appellee is not entitled to any commission at all because he was guilty of fraud and double dealing in that without appellant's knowledge or consent he also made a contract with the purchaser of appellant's farm to receive a commission from him for his services in the same matter. This was a question of fact and a fair question for the jury to determine from the evidence, which was conflicting, not only as to whether the appellee made any such contract, but also as to whether the appellant knew about it and consented to its being made. The court instructed the jury that if the appellee had made an agreement with the purchaser by which he was to receive compensation for his services in bringing about the sale, and that such fact was not known to the appellant at and before the time of consummating the sale, that the appellee would not be entitled to recover. By this instruction the question as to whether the appellee had made an agreement for commissions with the purchaser without the knowledge of the appellant was directly submitted to the jury for determination; and the jury determined the question against the appellant, The jury are in the best position to determine a question of this kind where the evidence is conflicting, and it is their province to do so; and a court of review is not justified under these circumstances in holding that the jury should have reached a different conclusion.

Whether the contract was as claimed by the appellee or as claimed by the appellant, was also a question of fact about which there is much contradiction and conflict in the evidence. It was therefore also a question for the jury to determine from all the evidence and the circumstances proven, whether the original contract for commissions was modified as appellant claimed. We are not

It is contended by the appellant that the appellee is not entitled to any commission at all because he was guilty of fraud and double dealing in that without appellant's knowledge or consent he also made a contract with the purchaser of appellant's farm to receive a commission from him for his services in the same matter. This was a question of fact and a fair question for the jury to determine from the evidence, which was conflicting, not only as to whether the appellee made any such contract, but also as to whether the appellant knew about it and consented to its being made. The court instructed the jury that if the appellee had made an agreement with the purchaser by which he was to receive compensation for his services in bringing about the sale, and that such fact was not known to the appellant at any time before the time of consummating the sale, that the appellee would not be entitled to recover. By this instruction the question as to whether the appellee had made an agreement for commissions with the purchaser without the knowledge of the appellant was directly submitted to the jury for determination; and the jury determined the question against the appellant. The jury are in the best position to determine a question of this kind where the evidence is conflicting, and it is their province to do so; and a court of review is not just that under these circumstances in holding that the jury should have reached a different conclusion.

Whether the contract was as claimed by the appellee or as claimed by the appellant, was the question of fact about which there is much contradiction and conflict in the evidence. It was therefore also a question for the jury to determine from all the evidence and the circumstances shown, whether the original contract for commissions was modified as appellant claimed. We are not

in position to say in the state of the proof in the record that the jury should have determined these matters in favor of the appellant.

It is argued by the appellant that even if the two per cent. commission is properly applied as the measure of appellee's compensation, it should only be applied to the actual value which the appellant realized for his farm, and that while the value of the appellant's farm at $200.00 per acre made $64,000.00, yet as a matter of fact the appellant only sold and received the value of his equity of redemption; that therefore the amount of the mortgages upon the farm should be deducted to arrive at the actual value received by appellant. At the time of the sale there was a mortgage of $24,000.00 upon the land, of which $2000.00 had been paid, leaving $22,000.00 of the encumbrance unpaid. By the entry of the remittur this question was eliminated from the case because the amount for which the judgment was entered ($640.00) amounts to two per cent. on the sale price of the land, after deducting the amount of the mortgage debt. The evidence clearly tends to show that the land had the value it sold for, and that the land which the appellant received in exchange as part of the consideration was the equivalent in value of the amount of the consideration for which it was taken in payment.

We find no reversible error in the record, and judgment is therefore affirmed.

Judgment affirmed.

in position to say in the state of the proof in the report that the jury should have determined the matter in favor of the appellant.

It is argued by the appellant that even if the two per cent commission is properly applied as the measure of appellee's compensation, it should only be applied to the actual value which the appellant realized for his farm, and that while the value of the appellee's farm at $300.00 per acre made $24,000.00, yet as a matter of fact the appellant only sold and received the value of his equity of redemption; that therefore the amount of the mortgages upon the farm should be deducted to arrive at the actual value received by appellant. At the time of the sale there was a mortgage of $22,000.00 upon the land, of which $3000.00 had been paid, leaving $22,000.00 of the encumbrance unpaid. By the entry of the remittur this question was eliminated from the case because the amount for which the judgment was entered ($480.00) amounts to two per cent on the sale price of the land, after deducting the amount of the mortgage debt. The evidence clearly tends to show that the land had the value it sold for, and that the note which the appellant received in exchange as part of the consideration was the equivalent in value of the amount of the commission for which he was taken in payment.

We find no reversible error in the record, and judgment is therefore affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6639

(678a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

214 I.A. 673

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6699

Sol Ginburg appellee

vs Appeal from Peoria.

H. C. Gibson, appellant.

Niehaus, P. J.

This case involves the question of the ownership of a piece of cloth, which the appellant as constable levied upon under an execution, as the property of D. Kahn, a merchant tailor in the city of Peoria; but which was claimed by the appellee Sol Ginburg, as his property. There was a trial of the right of property before a justice of the peace and a judgment in favor of the appellee; and thereupon an appeal taken to the circuit court of Peoria County where another trial by the court was had, a jury having been waived. The court found the cloth to be the property of the appellee; and rendered judgment accordingly. An appeal was thereupon presented to this court.

It appears from the evidence that the appellee went to Kahn and made contract with him for a suit of clothes, which were to cost $55.00. He picked by sample the kind of cloth of which he wanted the suit made. Under the contract Kahn was to buy the cloth in Chicago and make the clothes for the appellee for the amount stated; and in conformity with this arrangement Kahn ordered the cloth from Chicago for a pellee's suit, but afterwards found he could not get the cloth because he didnt have the money to pay for it; and the cloth had been sent by express, C. O. D. Thereupon a new arrangement was made by which the appellee paid for the cloth instead of Kahn; also the express charges on the same. And the cloth was thereupon taken from the express office, and was taken possession of by Kahn; and he took the cloth to his shop for the purpose of making a suit for the appellee out of it. Before

Gen. No. 8898

Sol Ginburg appellee

vs Appeal from Peoria.

H. C. Gibson, appellant.

Mr. Justice, P. J.

This case involves the question of the ownership of a piece of cloth, which the appellant as constable levied upon under an execution, as the property of D. Kahn, a merchant tailor in the city of Peoria; but which was claimed by the appellee Sol Ginburg, as his property. There was a trial of the right of property before a justice of the peace and a judgment in favor of the appellee; and thereupon an appeal taken to the circuit court of Peoria County where another trial by the court was had, a jury having been waived. The court found the cloth to be the property of the appellee; and rendered judgment accordingly. An appeal was thereupon prosecuted to this court.

It appears from the evidence that the appellee went to Kahn and made contract with him for a suit of clothes, which were to cost $22.00. He picked by sample the kind of cloth of which he wanted the suit made. Under the contract Kahn was to buy the cloth in Chicago and make the clothes for the appellee for the amount stated; and in conformity with this arrangement Kahn ordered the cloth from Chicago for appellee's suit, but afterwards found he could not get the cloth because he didn't have the money to pay for it; and the cloth had been sent to appellee, C. O. D. Thereupon a new arrangement was made by which the appellee paid for the cloth instead of Kahn; also the express charges on the same. And the cloth was thereupon taken from the express office, and was taken possession of by Kahn; and he took the cloth to his shop for the purpose of making a suit for the appellee out of it. Before

Kahn had done any work on the cloth however, the appellant as constable levied upon it under the execution against Kahn.

It is insisted by the appellant, that the cloth belonged to Kahn, because appellee's contract with Kahn was not for the cloth, but for a suit; and that Kahn ordered the cloth and was to pay for it; and that it would not become the property of the appellee until it was converted into and finished as a suit, for which the appellee was to pay $55.00 Appellants position on this question would be entirely right. if the contract which was originally made by the parties had still been in force at the time these goods were levied upon. Such however, was not the case. Under the new arrangement made, appellee took over the purchase of the cloth and paid for it. There could be no other reasonable construction put upon this transaction than that the appellee paid for the cloth in order to make it his own; and that Kahn's possession of it, was merely for the purpose of making it into a suit for appellee; and Kahn could not legally have used it for any other purpose. We conclude therefore that the evidence justified the court in finding that the ownership of the cloth was in the appellee at the time of the levy; and judgment is therefore affirmed.

Judgment affirmed.

Kahn had done any work on the cloth however, the appellant as constable levied upon it under the execution against Kahn.

It is insisted by the appellant, that the cloth belonged to Kahn, because appellee's contract with Kahn was not for the cloth, but for a suit; and that Kahn ordered the cloth and was to pay for it; and that it would not become the property of the appellee until it was converted into and finished as a suit, for which the appellee was to pay $35.00. Appellant's position on this question would be entirely right. If the contract which was originally made by the parties had still been in force at the time these goods were levied upon. Such however, was not the case. Under the new arrangement made, appellee took over the purchase of the cloth and paid for it. There could be no other reasonable construction put upon this transaction than that the appellee paid for the cloth in order to make it his own; and that Kahn's possession of it, was merely for the purpose of making it into a suit for appellee; and Kahn could not legally have used it for any other purpose. We conclude therefore that the evidence justified the court in finding that the ownership of the cloth was in the appellee at the time of the levy; and judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6655

(679a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

214 I.A. 679 2

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6658. Agenda 11, April Term, 1919.

Helen Mamaly,
Appellee,
-vs-
Appeal from Winnebago.

Calvin Countryman, C.
Millard Countryman,
Howard A. Countryman,
Walter v. Boyle, co-partners,
Appellants.

Carnes, J.

Appellants owned a two story and basement frame building fronting a public street in the city of Rockford for about one hundred feet, and occupied by their tenants; the first floor by tenants using it for store and residence purposes. the second floor by several resident families. There were two porches at the rear, each about 5½ feet wide and 16 feet long, furnishing egress from each floor to the back yard and privileges there used in common by all tenants. An outside stairway about 3 feet wide next to the wall of the building extended from the upper porch to the ground. This stairway was continuous except its landing on the lower porch was about 5 feet long. Appellee, Helen Mamaly, was a member of a tenant family occupying part of the upper floor. She came down the upper stairway and at said landing stepped to the side of the lower porch to tell a man delivering coal for her family where under the porch he should put it. While doing so she leaned against the wooden railing of the porch, it gave way, and she fell to the ground a distance of several feet, receiving serious injuries. She filed a declaration in trespass on the case, among other things alleging that the porch from which she fell

Gen. No. 6082. Agenda II, April Term,1913.

Helen Hamaly,
Appellee,

-vs- Appeal from Knox Co.

Calvin Countryman, C.
Millard Countryman,
Howard A.Countryman,
Walter V.Doyle, co-
partners,
Appellants.

Opinion.

Appellants owned a two story and basement frame building fronting a public street in the city of Rockford for about one hundred feet, and occupied by their tenants; the first floor by tenants using it for store and residence purposes. The second floor by several resident families. There were two porches at the rear, each about 3½ feet wide and 16 feet long, furnishing egress from each floor to the back yard and privileges there used in common by all tenants. An outside stairway about 3 feet wide next to the wall of the building extended from the upper porch to the ground. This stairway was continuous except the landing on the lower porch was about 3 feet long. Appellee, Helen Hamaly, was a member of a tenant family occupying part of the upper floor. She came down the upper stairway and at said landing stepped to the side of the lower porch to tell a man delivering coal for her family where under the porch he should put it. While doing so she leaned against the wooden railing of the porch, it gave way, and she fell to the ground a distance of several feet, receiving serious injuries. She filed a declaration in trespass on the case, among other things alleging that the porch from which she fell

was in the possession and control of the defendants as landlords, and was used in common by the tenants of the entire building, and that the railing was out of repair and in a dangerous condition, of which the defendants had notice. The general issue only was plead. She had a verdict of $2500. The court ordered a remittitur of $1500. which was entered, and judgment rendered for $1000. from which this appeal is prosecuted.

Appellants lay most stress on their contention that the part of the porch from which appellee fell was not in their possession and control but was a part of the premises demised to the tenants on the first floor, and therefore they, appellants, owned no duty to a tenant on the second floor to keep it reasonably safe. At their instance the court instructed the jury if they believed from the evidence that the tenants of the second floor had only the use of the stairway, and the plaintiff had no right, or license, to use the porch, and was there without invitation, right or license, they should find the defendants not guilty. There was evidence showing the use not only of the stairway, but of that portion of the porch by the tenants of the upper floor at times when it was proper and necessary for them, as such tenants to be there. The coal bin that appellee was pointing out to the teamster when she fell was directly under that portion of the porch. We think the jury were warranted in finding that the tenants of the upper floor, as such, were licensed by the landlords to use that portion of the porch from which appellee fell on such an occasion and for such a purpose as she was then using it; but there was no issue under the

was in the possession and control of the defendants as landlords, and was used in common by the tenants of the entire building, and that the railing was out of repair and in a dangerous condition, of which the defendants had notice. The general issue only was pleaded. The jury rendered a verdict of $2500. The court ordered a remittitur of $1500, which was entered, and judgment rendered for $1000. From which this appeal is prosecuted.

Appellants lay most stress on their contention that the part of the porch from which appellee fell was not in their possession and control but was a part of the premises demised to the tenants on the first floor, and therefore they, appellants, owed no duty to a tenant on the second floor to keep it reasonably safe. At their instance the court instructed the jury if they believed from the evidence that the tenants of the second floor had only the use of the stairway, and the plaintiff had no right, or license, to use the porch, and was there without invitation, right or license, they should find the defendants not guilty. There was evidence showing the use not only of the stairway, but of that portion of the porch by the tenants of the upper floor at times when it was properly occupied for them, as such tenants to be there. The real bill that appellee was pointing out to the tenants where she fell was directly under that portion of the porch. We think the jury were warranted in finding that the tenants of the upper floor, as such, were licensed by the landlords to use that portion of the porch from which appellee fell on such an occasion and for such a purpose as she was then using it; but there was no issue under the

pleadings as to the possession and control of the place in question. The plea not guilty, standing alone, admitted that allegation in the declaration. This rule of pleading has been many times repeated and applied by the supreme court since the decision in McNulta v.Lockridge, 137 Ill.270. The authorities are discussed and reviewed in Chicago Union Tract.Co.,v.Jerka, 227 Ill.95; see also, Pell v.J.P.& A.R.R.Co.,238 Ill. 510; Brunhild v.Union Traction Co,, 239 Ill.621; Carr v.U.S.Silica Co., 153 Ill.App. 511.

Appellants also claim that there was no actual notice to them that the railing was defective and required repair, and that it was not so visibly out of repair as to charge them with notice of that fact. There was evidence of direct notice to them of the defective condition and the necessity of repair,which they denied; also some conflict of evidence as to the condition of the railing, leaving the question of notice to be decided on conflicting evidence. It was submitted to the jury under an instruction offered by the defendants, and their verdict had sufficient support in the evidence to require its acceptance by the court on that question.

It is also claimed that the plaintiff was guilty of negligence in leaning over the railing. The court submitted that question to the jury under an instruction offered by appellants, and we think the evidence supports their conclusion that she was then and there in the exercise of ordinary care.

It is argued with considerable force and ingenuity that the confessedly excessive verdict indicates prejudice of

pleading as to the possession and control of the place in question. The plea not guilty, should be taken, admitted that allegation in the declaration. This rule of pleading has been many times expressly and applied by the supreme court since the decision in Smith v.Lockridge, 127 Ill.370. The authorities are discussed and reviewed in Chicago Union Trust.Co.,v.Jenks, 207 Ill.96; see also, Pell v.U.T.S.S.Co.,208 Ill. 310; Chicago v.Union Traction Co., 219 Ill.621; Carr v.U.C.Milling Co., 192 Ill.499, 511.

Appellants also claim that there was no actual notice to them that the railing was defective and required repair, and that it was not so visibly out of repair as to charge them with notice of that fact. There was evidence of direct notice to them of the defective condition and the necessity of repair, which they denied; also some conflict of evidence as to the condition of the railing, leaving the question of notice to be decided on conflicting evidence. It was submitted to the jury under an instruction offered by the defendant, and their verdict has sufficient support in the evidence to repay its consideration by the court on that question.

It is also claimed that the plaintiff was guilty of negligence in leaning over the railing. The court submitted that question to the jury under an instruction offered by appellants, and as with the evidence supports their conclusion that she was then and there in the exercise of ordinary care.

It is argued with considerable force and ingenuity that the contributorily exonerative verdict indicates prejudice or

the jury, or an entire misapprehension of the evidence and instructions; that appellants are entitled to a trial by a fair and impartial jury and should only be required to respond to a verdict rendered by such a jury. This argument might require much consideration and comment if the practice of allowing remittiturs in the trial and appellate courts had not been so long sanctioned by our supreme court. The authorities on that question are quite fully discussed in North Chicago Street R.R.Co., v. Wrixom, 150 Ill.532; and again in Chicago City Ry.Co.,v.Gemmill, 209 Ill.638, where it is said the practice is too well established to be questioned. Complaint is made of the ninth instruction given at the instance of appellee on the question of damages in which the jury were told, among other things, that they might take into consideration the plaintiff's suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as they might believe from the evidence she had sustained or will sustain by reason of such injuries. It is said that the instruction permitted the jury to assume that appellee might suffer mentally because of scars and facial disfigurement produced by the injury, and base a finding on such assumed suffering in body or mind; also, that the evidence failed to show any suffering or pain in body or mind after she left the hospital some ten days after the injury, and for these reasons the instruction was erroneous. Appellee testified that at the time of the trial she was suffering dizziness and that she was then unable to extend her right forefinger without effort. It is well settled that she had a right to recover for mental suffering caused by the injury. That

the jury, or an entire misapprehension of the evidence and instructions; that appellants are entitled to a trial by a fair and impartial jury and should only be required to respond to a verdict rendered by such a jury. This argument might require much consideration and comment if the practice of allowing recoveries in the trial and appellate courts had not been long sanctioned by our supreme court. The authorities on that question are quite fully discussed in North Chicago Street R.R.Co., v. Ertzen, 140 Ill.529; and again in Chicago City Ry.Co.,v.Kemmill, 209 Ill.624, where it is said the practice is too well established to be questioned. Complaint is made of the much instruction given at the instance of appellee on the question of damages in which the jury were told, among other things, that they might take into consideration the plaintiff's suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as they might believe from the evidence she had sustained or will sustain by reason of such injuries. It is said that the instruction permitted the jury to assume that appellee might suffer mentally because of scars and facial disfigurement produced by the injury, and base a finding on such assumed suffering in body or mind; also, that the evidence fails to show any suffering on her in body or mind after she left the hospital each ten days after the injury, and for these reasons the instruction was erroneous. Appellee testified that at the time of the trial she was suffering dizziness and that she was then unable to extend her right fingers without effort. It is well settled that she has a right to recover for mental suffering caused by the injury. Ian

feature of the instruction was considered in West Chicago St.R.R. Co.,v.Johnson, 180 Ill. 285; Consolidated Trac.Co., v.Schritter, 222 Ill.364; and North Chicago St.R.R.Co., v.Hutchinson, 92 Ill.App. 567, and held proper. We see no error in the instruction.

No other instruction is criticised and no error in the admission or rejection of evidence is suggested. It is not claimed that the judgment of $1000. is excessive. We see no sufficient reason for disturbing any finding of the jury, and discover no error of law in the trial of the case; therefore,the judgment is affirmed.

Affirmed.

feature of the instruction was considered in West Chicago St.R.R. Co., v.Johnson, 180 Ill. 244; Consolidated Trac.Co., v.Schritter, 222 Ill.364; and North Chicago St.R.R.Co., v.Hotchinson, 92 Ill.App. 567, and said power. We see no error in the instruction.

No other instruction is criticised and no error in the admission or rejection of evidence is suggested. It is not claimed that the judgment of $1000. is excessive. We see no sufficient reason for disturbing any finding of the jury, and discover no error of law in the trial of the case; therefore, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

662
(680a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

214 I.A. 673

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6662. Agenda 14. April Term, 1919.

William H.Hubbard, Appellee, -vs- Sterling,Dixon & Eastern Electric Railway Company, Appellant.	Appeal from City Court, City of Sterling.

Carnes, J.

William H.Hubbard, the appellee, sixty-nine years old, while driving a motor truck with a load of milk in cans from a farm yard on a lane north and across the east and west electric railroad track of the appellant, was struck by a car running east, his truck destroyed, and himself seriously injured. He brought this action of trespass on the case for damages to himself and property, and had a judgment on a verdict for $2358.85, from which this appeal is prosecuted.

Appellee's business was gathering milk from farmers. This farm yard was about 300 feet south of the railway right of way. The lane led across appellant's right of way to the public highway. Appellee was familiar with the situation. There were apple trees and some brush on appellant's right of way that obstructed the view from the lane to the tract a considerable part of the distance. Appellee did not see the approaching car until it was 150 feet to 200 feet from the crossing, and he was on or very near the right of way, and the motorman did not see the truck before that time. The truck was running about five miles an hour, and it is conceded the car was running twenty-five or thirty miles an hour, and from the effect of the collision it is reasonably argued that it

Gen. No. 666. Agenda 14. April Term, 1912.

William E. Ashburn,
Appellee,
-vs-
Sterling, Nunn & Lytsterm
Electric Railway
Company,
Appellant.

Appeal from City Court.
City of Sterling.

Green, J.

William E. Ashburn, the appellee, sixty-nine years old, while driving a motor truck with a load of milk in cans from a farm yard on a lane north and across the east and west electric railroad track of the appellant, was struck by a car running east, his truck destroyed, and himself seriously injured. He brought this action of trespass on the case for damages to himself and property, and had a judgment on a verdict for $2000.00, from which this appeal is prosecuted.

Appellee's business was delivering milk from farmers. This farm yard was about 300 feet north of the railway right of way. The lane led across appellant's right of way to the public highway. Appellee was familiar with the situation. There were apple trees and some brush on appellant's right of way that obstructed the view from the lane to the track a considerable part of the distance. Appellee did not see the approaching car until it was 150 feet to 200 feet from the crossing, and he was on or very near the right of way, and the motorman did not see the truck before that time. The truck was running about five miles an hour, and it is conceded the car was running twenty-five or thirty miles an hour, and from the effect of the collision it is reasonably argued that it

was running much faster than that.

There is little contention that the evidence does not show negligence of the defendant. It is suggested while appellant's permitting the apple trees to remain on its right of way might under some circumstances be deemed negligence, that under the facts in this case it was not because there were neither apple trees nor brush that sufficiently cut off the view to make much, if any, difference in the situation. The evidence was conflicting as to the growth of the brush, and we see no ground for questioning the jury's finding of the defendant's negligence. But appellant insists that appellee was not himself in the exercise of ordinary care, and devotes substantially all its argument on the facts to that contention, which it groups under three questions: (1) Did Hubbard look for the car before attempting to cross the track? (2) If he had looked, would he have seen the car in time to avoid the injury? (3) If he looked at all, did he do so early enough? or did he look after it was too late? Which questions together mean could appellee, had he looked at the right time and place, have seen the car in time to avoid the injury. The answer is yes; and he did not look at that time and place. He testified that he did look at some points on the land and failed to see the car, and although there is some testimony tending to show that he had before said he forgot to look, this is denied, and the jury were warranted in finding that he did look, but not at the proper time and place, leaving the question for their determination whether he failed to exercise ordinary care in omitting so to look.

The court at appellant's instance instructed the jury that ordinary care was such as,"Every person of common prudence bestows

was running much faster than that.

There is little conjecture that the evidence does not show negligence of the defendant. It is suggested while appellant's permitting the apple trees to remain on its right of way might under some circumstances be deemed negligence, that under the facts in this case it was not because there were neither apple trees nor brush that sufficiently cut off the view to make much, if any, difference in the situation. The evidence was conflicting as to the growth of the brush, and we see no ground for questioning the jury's finding of the defendant's negligence. But appellant insists that appellee was not himself in the exercise of ordinary care, and devotes substantially all its argument on the point to that question, which it groups under three questions: (1) Did Hubbard look for the car before attempting to cross the track? (2) If he looked, could he have seen the car in time to avoid the injury? (3) If he looked at all, did he do so early enough? or did he look after it was too late? Assignments are together each considerable, but he looked at the right time and place, have seen the car in time to avoid the injury. The answer is yes; and he did not look at that time and place. He testified that he did look at some points on the road and failed to see the car, and although there is some testimony tending to show that he had before said he forgot to look, this is denied, and the jury were warranted in finding that he did look, but not at the proper time and place, leaving the question for the determination whether he failed to exercise ordinary care in omitting so to look.

The court at appellant's instance instructed the jury that ordinary care was such as "Every person of common prudence usually

"upon his or her affairs or cincerns; and the prudence and vigilance which reason and law require a person to exercise for his or her own safety must be proportioned to the danger and be exercised with reference to the situation;" that negligence is the failure to exercise ordinary care; that if the plaintiff by the exercise of ordinary and reasonable care in looking out for danger could have avoided injury the verdict should be not guilty; that if they believed from the evidence that ordinary care required the plaintiff to look to ascertain whether a car was approaching, and he did not so look, and was injured because of such failure, the verdict should be not guilty; therefore, the jury had this question to consider under instructions framed by appellant as favorable as warranted.

The definition of negligence often sanctioned by our supreme court is "The omission to do some thing which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of some thing which a prudent or reasonable man would not do." L. Wolff Manf.Co.,v.Wilson, 152 Ill.9; P.Ft.W.& C.Ry.Co.,v.Callaghan, 157 Ill.406. If at any given time and place a plaintiff is exercising that care which a reasonable man would ordinarily exercise under the same or similar circumstances it is all that is required of him. In 29 CYC the author gives in the notes many definitions of ordinary care formulated by courts, and states in the text as the most apt,"That degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances." Whether the plaintiff in this case was so acting was a question for the jury. It is not what care might be exercised to avoid an injury, or what care a court or jury thinks should be exercised in driving on to a railway crossing.

"upon his or her safety or interest; and the reference can vitiate which reason and law require a person to exercise for his or her own safety and is proportioned to the danger and is exercised with reference to the circumstances." This is equivalent to the failure to exercise ordinary care; that if the plaintiff by the exercise of ordinary and reasonable care in looking out for danger could have avoided injury the verdict should be not guilty; that if they believed from the evidence that ordinary care required the plaintiff to look to ascertain whether a car was approaching, and he did not so look, and was injured because of such failure, the verdict should be not guilty; therefore, the jury for this reason to consider under instructions issued by plaintiff is erroneous and prejudicial.

The definition of negligence often mentioned by our courts runs: "The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of some thing which a prudent or reasonable man would not do." L. Volk Manf.Co.,v.Miller, 151 Ill.3; P.R.R.A.U.Ry.Co.,v.Collinson, 107 Ill.402. If at any given time and place a plaintiff is exercising that care which a reasonable man would ordinarily exercise under the same or similar circumstances it is all that is required of him. In the instant case it is not the motor man - Fallows of ordinary or formulated by courts, and states in the text as the most apt, "that degree of care which is exercised by reasonably prudent persons under the same or similar circumstances." Further the plaintiff in this case was to assign and - specifies for the jury. It is not what care might be exercised to avoid an injury, or what care - court or jury think should be exercised in driving on a public highway.

Such accidents at grade crossings would rarely, if ever, happen if all travelers approaching them exercised a very high degree of care and caution. The question is, what care do ordinarily prudent persons ordinarily exercise at such times and places. It is argued that appellee did not look at all while coming up the lane. If he did not, while it was not negligence as matter of law; yet, as matter of fact, it might well be argued that a jury could not reasonably conclude his conduct was up to the required measure of prudence. But the question whether he was entirely oblivious of the danger and drove upon the right of way in a fit of abstraction had to be answered by weighing conflicting testimony, and there was sufficient evidence that he was giving such thought and attention to the matter as ordinarily prudent men ordinarily do under such circumstances to forbid a court's disturbing the finding of the jury. Their conclusion as to what the plaintiff actually did, and whether it measured up to the required standard is to be accepted, unless it is manifestly against the weight of the evidence- and we do not think it is.

The court refused three instructions offered by the defendant. The first two read together advised the jury that a railway company is not liable in damages for every accident; is not liable for unavoidable accidents; is not required to be all the while on guard against dangers not reasonably to be expected, or against extraordinary occurrences or conduct of others; and is not required to conduct its cars with a degree of caution that would prevent the practicable operation of its road. These instructions stated correct principles and should have been given if not covered by other given instructions. But at the instance of appellant the jury were instructed that the plaintiff could not recover at all unless he had proven by the greater weight of evidence that the defendant was guilty

such accidents at grade crossings would result, if ever, when all travelers approaching them exercised a very high degree of care and caution. The question is, what is an ordinarily prudent person ordinarily exercise at such place and times. It is argued that appellee did not look at all while coming up the lane. It is admitted, while it was not negligence as matter of law; yet, as matter of fact, it might well be argued that a jury could find reasonably appellee did conform up to the required measure of prudence. But the question whether he was entirely oblivious of the danger and drove upon the risk of any in a fit of abstraction had to be answered by weighing conflicting testimony, and there was sufficient evidence that he was giving such thought and attention to the matter as ordinarily prudent men ordinarily do under such circumstances to form a sound judgment during the finding of the jury. Their conclusion as to what the plaintiff actually did, and whether it measured up to the required standard is to be accepted, unless it is manifestly against the weight of the evidence- and we do not think it is.

The court refused three instructions offered by the defendant. The first two read together advised the jury that a railway company is not liable in damages for every accident; is not liable for unavoidable accidents; is not required to be all the while on guard against dangers not reasonably to be expected, or against extraordinary occurrences or conduct of others; and is not required to conduct its cars with a degree of caution that would prevent the practicable operation of its road. These instructions stated correct principles and should have been given if not covered by other given instructions. But at the instance of appellee the jury were instructed that the plaintiff could not recover at all unless he had proven by the greater weight of evidence that the defendant was guilty

of negligence inthe manner charged in the declaration, and that such negligence was the proximate or direct cause of the injury in question. This instruction, coupled with the one heretofore noted defining negligence, made it plain that the defendant was not liable for an unavoidable accident. The court also in another instruction offered by the defendant told the jury a railway company is not liable to every person injured by its cars, and if they believed from the evidence that at the time, or at and immediately before said injury, the operator of the car was exercising the highest degree of care practicable in its operation and management, or that the plaintiff was not exercising ordinary care and prudence, then the verdict should be not guilty; therefore, the refusal of those two instructions was not reversible error. The third refused instruction informed the jury that before the plaintiff could recover the proof must show not only that the defendant was guilty of negligence, but also that the plaintiff was using reasonable care for his own safety at and immediately before the time of the accident. This is a correct proposition of law, and the defendant had the right to have the jury fully informed on that point. But at its instance the court did instruct the jury, as before noted, of the necessity of proof that the plaintiff was exercising ordinary care at the time and place in question, and that statement was repeated in substance in three other instructions given for the defendant in which they were told if they believed from the evidence that the plaintiff by using his faculties with ordinary and reasonable care in looking out for danger could have avoided injury, he could not recover; and if they believed from the evidence that ordinary care required under

all the circumstances that he look and ~~linkx~~ ascertain whether a car was approaching, and if he had so looked he could, by the exercise of ordinary care, have seen the car and avoided the injury he could not recover. These instructions were full, leaving the jury thoroughly advised on that point, and the court properly refused to further repeat the proposition in different language.

Complaint is made of the modification by the court of one instruction offered by the defendant. As modified it read:

> "The court instructs the jury that you should not arrive at a verdict by chance. A verdict should be arrived at only after due deliberation and after fairly considering all the evidence admitted by the court and the law as given by these instructions of the court."

As offered it contained the further statement that the jury should not compromise between questions of liability and the amount of damage, and snould not consetnt to a verdict which did not meet with the approval of their own judgments and conscience. The first statement eliminated was very fully covered by the defendant's first given instruction where the jury were told at length that they should not consider the extent of the injuries at all until they had determined the question of liability. They were also in that instruction warned that neither partiality, prejudice, nor sympathy should influence them in deciding the case, and that their oath required them to try the case the same as they would if it were a lawsuit between two men. The instructions are to be considered as a whole, and with that in view the modification was proper.

all the arguments that is look at it in certain whether a car was speeding, and if he was so issued to trial, by the exercise of ordinary care, how soon the car should the injury he could not recover. These instructions were full, having the jury thoroughly stated on that point, and the court properly refused to further repeat the proposition in different language.

Complaint is made of the modification by the court of one instruction offered by the defendant. As modified it read:

"The court instructs the jury that you should not arrive at a verdict by chance. A verdict should be arrived at only after the deliberation and after fairly considering all the evidence adduced by the court and the law as given by these instructions of the court."

As offered it contained the further statement that the jury should not speculate between equalities of probability and the amount of damage, and should not assent to a verdict which did not meet with the approval of their own judgments and conscience. The first statement claimed to be very fully covered by the defendant's first given instruction where the jury were told at length that they should not consider the amount of the injuries at all until they had determined the question of liability. Only one in that instruction served this additive purpose, prejudice, nor improperly should influence them in making the award, and that their oath required them to try the case the same as they would if it were a lawsuit between two men. The instructions are to be considered as a whole, and with that in view the modification was proper.

It is not claimed that the verdict ~~ix~~ was excessive. But it is suggested that it is a "quotient" verdict. It is conceded that there is nothing before the court except the unusual minuteness in figures furnishing any evidence that in was reached in any improper manner in the jury room, and it is not claimed that it is within the duty or power of the court to disturn the verdict because of some shrewd guess that the jury indulged in some improper argument among themselves to induce its adoption. We believe there are authorities on what will be regarded an improper way of reaching a verdict, and how far and to what extent jurors may undertake to average individual judgments in reaching an amount (38 CYC 1845); but counsel do not cite them, probably because in a case like this where there is no knowledge of how the verdict was reached they are not pertinent, and for that reason we do not discuss them. Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

It is not claimed that the verdict in the conservator. But it is suggested that it is a "judgment" verdict. It is conceded that there is nothing before the court except the unusual circumstances in figures furnishing any evidence that it was reached in any improper manner in the jury room, and it is not claimed that it is within the duty or power of the court to disturb the verdict because of some errors that the jury included in some improper amount because to induce its adoption. We believe there are authorities on that will be regarded an improper way of reaching a verdict, and law leaves to what extent jurors may undertake to average individual judgments in reaching an amount (36 CJS 1043); but usually do not do this, probably because in a case like this where there is no knowledge of how the verdict was reached they are not criticized, and for that reason we do not discuss them. Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6662

(681a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

214 I.A. 673 4

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 18 1919

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6682

N. J. Sandberg Co. a corp. appellee

vs Appeal from Lake.

B. E. Simmons, et al appellants.

Carnes, J.

Appellants, B. E. Simmons, H. C. Horning, and Peter R. Simmons, October 25, 1915, made their promissory note of that date for $1000 payable to the order of themselves ninety days after date, with interest from date, endorsed the same in blank, and put it in circulation. Before it was due it was changed on its face as to time of payment from ninety days to one hundred twenty days and transferred, so changed, to the appellee corporation as collateral security for a debt of the holder. It does not appear by whom it was changed, but neither the makers nor appellee were a party to the alteration, and appellee received it without notice or knowledge of any change except what, if anything, might be known from an inspection of the note. It was accepted by appellee after inquiry at two banks as to the solvency of the makers and after showing the note to one of the banks where the makers were known and its being declared good there. This suit was brought on the note, and the above facts appearing in evidence without dispute the court directed a verdict for the plaintiff, on which judgment was entered. Section 52 of our Negotiable Instruments act defines "a holder in due course " as one who takes the instrument (1) complete and regular upon its face; (2) before it is overdue and without notice that it has been previously dishonored; (3) in good faith and for value; (4) without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Appellee was a holder in due course unless there was notice of infirmity on the face of the note. Section 133 of the act provides that where a negotiable instrument has been materially altered and is in

Ser. No. 6128

N. J. Tuckerg Co. a corp. appellee

vs Appeal from Lake.

E. E. Simmons, et al appellants.

Carnes, J.

Appellants, E. E. Simmons, N. C. Nutting, and Peter D. Simmons, October 8, 1912, made their promissory note of that date for $1500 payable to the order of themselves ninety days after date, with interest from date, endorsed the same in blank, and put it in circulation. Before it was due it was changed on its face as to time of payment from ninety days to one hundred twenty days and transferred, so changed, to the appellee corporation as collateral security for a debt of the holder. It does not appear by which it was changed, but neither the makers nor appellee were a party to the alteration, and appellee received it without notice or knowledge of any change except what, if anything, might be learned from an inspection of the note. It was accepted by appellee after inquiry at two banks as to the solvency of the makers and after showing the note to one of the banks where the makers were known and its being indorsed good there. This suit was brought on the note, and the above facts appearing in evidence without dispute the court directed a verdict for the plaintiff, on which judgment was entered. Section 82 of our Negotiable Instruments act declares "A bill or instrument " be one who fulfills the requirement (1) complete and regular upon its face; (2) before it is overdue and without notice that it has been previously dishonored; (3) in good faith and for value; (4) without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Appellee was a holder in due course unless there was notice of infirmity on the face of the note. Section 183 of the act provides that where a negotiable instrument has been materially altered and is in

the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor; therefore, if appellee was a holder in due course the judgment was correct, and if the note did not on its face bear evidence of alteration it was a holder in due course. The original note has been certified to thisc ourt for inspection. We have carefully examined it and agree with the trial court that there is nothing on the face of the note to give notice or warning of the alteration. The number was so skilfully changed that it did ~~ne~~ escape detection when shown to the bank, and we think there is no reasonable doubt that it could be offered to and examined by any banking house in the ordinary course of business without raising a suspicion that it was not as originally written.

There is considerable discussion by counsel of the question whether the alteration was material, and some other questions that might arise under different statutes. For the purpose of this decision we assume appellants' position that the alteration was material, and would have avoided payment of the note in the hands of any holder that was a party to or had knowledge of the alteration. But after considering that, the defendants are still liable on the note. The judgment is affirmed.

Affirmed.

the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor; therefore, if objection was a valid in the course the judgment was correct, and if the note did not on its face bear evidence of alteration it was a holder in due course. The original note has been certified to this court for inspection. We have carefully examined it and agree with the trial court that there is nothing on the face of the note to give notice or warning of the alteration. The number was so skillfully changed that it did not become detection when shown to the bank, and we think there is no reasonable doubt that it could be offered to and examined by any banking house in the ordinary course of business without raising a suspicion that it was not as originally written.

There is considerable discussion by counsel of the question whether the alteration was material, and some other questions that might arise under different statutes. For the purpose of this decision we assume appellants' position that the alteration was material, and would have avoided payment of the note in the hands of any holder that was a party to or had knowledge of the alteration. But after considering that, the defendants are still liable on the note. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

66-H

(6822)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

214 I.A. 673

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6666
Sampson T. Rowe, appellant.

vs Appeal from Marshall.

Lewis R. Phillips et al

appellees.

Dibell, J.

On September 19, 1916, Sampson T. Rowe brought this action against Lewis R. Phillips, L. Edgar Jerome, and the Western Bankers Trust Company, for fraud and deceit in selling to him at different times capital stock of the Trust Company for which he paid $17,500.00, and which stock was alleged to be worthless, and the representations by which he was induced to buy the same, false and fraudulent. Sampson T. Rowe was the husband of Ellen Rowe who brought a similar action against the same defendants, which is case No. 6665 Rowe Administrator, v Phillips, et al, in which we file an opinion this day. The course of pleading in the present is substantially the same as in the case just referred to, and a like judgment was entered in bar, and plaintiff appealed. The attorneys for the respective parties were the same in that case as in this, and the briefs they have filed here are with slight exceptions identical with those filed in that case. No substantial difference in the pleading is suggested by counsel. The principles of law applicable to this case are the same as in that case. The first additional count filed January 16, 1917 in one place contained an insufficient averment of the scienter, but in another place in said count there was a sufficient averment on that subject. That count alleged that Sampson T. Rowe was seventy five years old, without education, barely able to read and write, with no experience in buying and selling capital stock; that he had been a farmer working a farm in Marshall County till about five years before that time, when he removed to the city of Henry because of his inability to continue farming by reason of age; and that for several years

Gen. No. 8888

Sampson T. Howe, appellant.

vs Appeal from Marshall.

Lewis R. Phillips et al

appellees.

Dibell, J.

On September 16, 1912, Sampson T. Howe brought this action against Lewis R. Phillips, L. Tiger Jerome, and the Western Bankers Trust Company, for fraud and deceit in selling to him at different times capital stock of the Trust Company for which he paid $17,500.00, and which stock was alleged to be worthless, and the representations by which he was induced to buy the same, false and fraudulent. Sampson T. Howe was the husband of Ellen Howe who brought a similar action against the same defendants, which is case No. 8885 Howe Administrator, v Phillips, et al, in which we file an opinion this day. The course of pleading in the present is substantially the same as in the case just referred to, and a like judgment was entered in bar, and plaintiff appealed. The attorneys for the respective parties were the same in that case as in this, and the briefs they have filed here are with slight exceptions identical with those filed in that case. No substantial difference in the pleading is suggested by counsel. The principles of law applicable to this case are the same as in that case. The first additional count filed January 18, 1917 in one place contained an insufficient averment of the assignor, but in another place in said count there was a sufficient averment on that subject. That count alleged that Sampson T. Howe was seventy five years old, without education, barely able to read and write, with no experience in buying and selling capital stock; that he had been a farmer working a farm in Marshall County till about five years before that time, when he removed to the city of Mary because of his inability to continue farming by reason of age; and that for several years

past he had been afflicted with defective eye sight, and was unable to hear with distinctness; and that these facts were knwon to the defendants at the time of the transactions thereinafter set forth. It also contained averments like those set out in our opinion in the case just referred to, concerning the confidential relation between himself and Phillips and the relation of trust between them, and his reliance upon Phillips implicitly in his financial affairs; and that Phillips had transacted for several years a large part of his personal business; and that Phillips knew that plaintiff relied upon him for direction and advice in business matters. The other allegations of said count are substantially the same as in the count described in the other case In our opinion, it stated a cause of action, and it was error to strike it from the files, for the reasons stated in said other opinion. Other counts in the declaration which omitted a positive allegation of scienter were sufficient under the modified rule stated in that case. What was said in our other opinion about action by the court when there was no plaintiff in court does not apply to this case. In all other respects our former opinion is applicable here. The judgment is therefore reversed and the cause remanded for further proceedings in conformity with the legal principles stated in th at opinion.

Reversed and remanded.

Niehaus P. J. took no part.

part in had been afflicted with defective eye sight, and was unable to bear sick disagreeable; and that these facts were known to the defendants at the time of the transactions hereinafter set forth. It also contained averments like those set out in our opinion in the case just referred to, concerning the confidential relation between Kissell and Phillips and the relation of trust between them, and his reliance upon Phillips implicitly in his financial affairs; and that Phillips had transacted for several years a large part of his personal business; and that Phillips knew that plaintiff relied upon him for direction and advice in business matters. The other allegations of said count are substantially the same as in the count described in the other case. In our opinion, it stated a cause of action, and it was error to strike it from the files, for the reasons stated in said other opinion. Other counts in the declaration which omitted a positive allegation of scienter were sufficient under the modified rule stated in that case. What was said in our other opinion about action by the court when there was no plaintiff in court does not apply to this case. In all other respects our former opinion is applicable here. The judgment in therefore reversed and the cause remanded, for further proceedings in conformity with the legal principles stated in it opinion.

Reversed and remanded.

McNamee P. J. took no part.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6674

(683a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

214 I.A. 674

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 18 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6674. 21.

Clarence E.Turney,
Appellee,
-vs- Appeal from Whiteside.
Russell Shepherd,
Appellant.

Dibell, J.

This is replevin, brought by Clarence E.Turney against Russell Sherpherd for certain animals and agricultural implements. The declaration alleged in one count that defendant took and unjustly detained said property, and in another that he unjustly detained said property, with a count in trover. Defendant pleaded non cepit, non detinet, property in defendant, and not guilty as to the count in trover. There was no special joinder to the plea of property in defendant, but the parties voluntarily went to trial without forming a written issue as to that plea and the case is to be treated as if an oral issue had been joined. We collected the authorities on this point in Witteman Co.vs. Cooke, 200 Ill.App. 108. There was a trial and a verdict and a judgment for plaintiff. The judgment was informal. It was only for costs. As plaintiff obtained the property upon the writ of replevin, the judgment should have been that plaintiff have and retain the property described in the writ of replevin, and in the return on said writ; but there are no cross errors assigned by plaintiff upon which we can review and remand with directions to enter the proper judgment. Defendant appeals from the judgment.

6074. 21.

Clarence L. Torrey,
appellee,
-vs-
Russell Shepherd,
appellant.

Appeal from Whiteside.

Mr. J. J. A.

This is replevin, brought by Clarence L. Torrey against Russell Shepherd for certain animals and agricultural implements. The declaration alleged in one count that defendant took and unjustly detained said property, and in another that he unjustly detained said property, with a count in trover. Defendant pleaded non cepit, non detinet, property in defendant, and not guilty as to the count in trover. There was no special joinder to the plea of property in defendant, but the parties voluntarily went to trial without joining a written issue on to that plea and the case is to be treated as if an oral issue had been joined. We allowed the authorities on this point in Wiseman Co. vs. Davis, 200 Ill. App. 100. There was a trial and a verdict and a judgment for plaintiff. The judgment was interlocutory, it was only for costs. As plaintiff obtained the property upon the writ of replevin, the judgment should have been that plaintiff have and retain the property described in the writ of replevin, and in the return on said writ; but there are no such errors assigned by plaintiff upon which we can review and remand with direction to enter the proper judgment. Defendant appeals from the judgment.

The main undisputed facts are as follows: Plaintiff sold defendant the property in dispute at the agreed price of $475.00 and defendant took the property home. Defendant was at that time about twenty years and three months old. A few days later plaintiff drew a note for the amount, due in one year, and took it to defendant, and the latter signed it and delivered it back. Plaintiff took the note to a village bank nearby and sought to have it cashed and the bank refused because the maker was a minor, and the banker told the plaintiff it was good for nothing. Plaintiff then went to defendant and asked for another note and it was refused. He then went to defendant's home, where defendant's sister lived with him, and took out the note, and the corner thereof where the signature was having been already partly torn off, he tore it off entirely, put the signature in his pocket, and gave defendant's sister the note and then took home the property which he had sold. A few days later defendant's brother, Joseph, called upon plaintiff in the morning and they had a conversation about the matter. In the afternoon defendant and his brother, Joseph, and the hired man came to plaintiff's home and with the assistance of plaintiff took the property back to defendant's place and plaintiff sent his hired man to help them, and the body of the town note was sent back by the hired man. A few days later plaintiff again went and demanded the property of defendant and his demand being refused he brought this suit.

The main disputed facts are as follows:- Plaintiff testified that when he sold the property to defendant the latter

agreed to give him a good note or a bankable note; that when he found that the banker would not discount the note he took because of the minority of the defendant, and said that it was good for nothing, he took it back to defendant and demanded of him a note signed by some one else, and that being refused, he delivered the body of the note to defendant's sister and took the property home because he had not received such a note as had been promised him; that when Joseph came to him in the morning of a later day Joseph told him that they would give him a good note and that he should be paid, and that he then assisted in returning the property to defendant; that he waited two or three days for such a note to be brought to him and, not receiving it, he demanded the return of the property by defendant, and that being denied, he brought this suit. The two parts of the torn note were tendered to defendant during the trial, Defendant introduced proof that he had never promised to give plaintiff a good note or a bankable note. Joseph testified that at the interview with plaintiff on the morning preceding the afternoon when plaintiff again delivered the property to defendant, he did not promise that plaintiff should have a good note or a bankable note, or that he should be paid, though he admits that they had a conversation about a note and that he promised plaintiff that he should have a new note. Joseph went to see plaintiff that forenoon after a conversation with defendant and evidently pursuant thereto.

Defendant argues that the note was good because it would not mature till defendant was of age and he could not then set up his minority when it was given to defeat it without returning

agreed to give him a good note or a bankable note; that when he found that the banker would not discount the note he took it home of the minority of the defendant, and said that it was good for nothing, he took it back to defendant and demanded of him a note signed by some one else, and that being refused, he delivered the body of the note to defendant's sister and took the property home because he had not received such a note as had been promised him; that when Joseph went to him in the morning of a later day to sign this, that they could give him a good note and that he should be paid, and that he then assisted in returning the property to defendant; that he waited two or three days for such a note to be brought to him and, not receiving it, he demanded the return of the property by defendant, and that being refused, he brought this suit. The two sons of the plaintiff were tendered to defendant during the trial. Defendant introduced proof that he had never promised to give plaintiff a good note or a bankable note. Joseph testified that at the interview with plaintiff on the morning preceding the afternoon when plaintiff again delivered the property to defendant, he did not promise that plaintiff should have a good note or a bankable note, or that he would be paid, though he stated that they had a conversation about a note and that he promised plaintiff that he should have a new note. Joseph was to see plaintiff that afternoon after a conversation with defendant and evidently persuade there to.

Defendant argues that the note was good because it would not mature till defendant was of age and he could not then sue by his minority when it was given to defeat it without returning

the property for which it was given. It is evident that the property would change during that year and might deteriorate and if plaintiff was promised a good note the parties did not mean to subject plaintiff to the risks of such litigation as might easily arise in such case. If plaintiff's evidence is true it was intended that he should have a note which he could immediately discount at a bank, and this was not such a note. Each side insists that it has the greater weight of the evidence. We have carefully examined the evidence in the record and are convinced by it and by the reasonable probabilities of the situation in which the parties were, that the plaintiff was legally entitled to recover his property, and that the jury were warranted in so finding, and that the verdict does substantial justice.

The court at the instance of plaintiff gave an instruction, that if they believed certain facts from the preponderance of the evidence, then plaintiff had a right to maintain replevin for the goods. It omitted to refer to the claim of the defendant that plaintiff waived the right to security. Defendant argues that as this instruction practically directed a verdict for plaintiff, the giving of it was reversible error. In answer, plaintiff relies upon cases holding that a party is entitled to have instructions based upon his own theory of the case, without stating the theory of the opposite side. The better rule seems to be that that principle is not applicable to an instruction ,which directs a verdict. It is, however, sometimes held that such an instruction, though incorrect, does not constitute reversible error. The principles respectively relied

the property for which it was given. It is evident that the property would change during that year or eight months and if plaintiff was promised good note the parties did not mean to subject plaintiff to the risks of such litigation as might easily arise in such case. If Plaintiff's evidence is true it was intended that he should have a note which he could immediately discount at a bank, and this was not such a note. Both sides insists that it is the greater weight of the evidence. We have carefully examined the evidence in the record and are convinced by it and by the reasonable probabilities of the situation in which the parties were, that the plaintiff was legally entitled to recover his property, and that the jury were warranted in so finding, and that the verdict does substantial justice.

The court at the instance of plaintiff gave an instruction, that if they believed certain facts from the preponderance of the evidence, then plaintiff had a right to maintain replevin for the goods. It omitted to refer to the claim of the defendant that plaintiff waived the right to recovery. Defendant argues that as this instruction practically directed a verdict for plaintiff, the giving of it was reversible error. However, plaintiff relies upon cases which clearly establish that a party is entitled to have instructions based upon his own theory of the case, without sustaining the theory of the opposite side. The rule seems to be that that principle is not applicable to an instruction which directs a verdict. It is, however, sometimes held that such an instruction, though incorrect, does not constitute reversible error. The principle respecting motion

upon by plaintiff and defendant on this subject are stated and discussed in the following recent cases and in many other cases there cited. Mooney v.City of Chicago, 239 Ill. 414; St.L.& Ill. Belt Ry.Co., v.Gunswelle, 236 Ill. 214; Ratner v Chicago City Ry. Co., 233 Ill. 169; Chicago City Ry.Co., v.Shreeve, 226 Ill.530; Terra Cotta Lumber Co., v.Hanley, 214 Ill. 243. The court gave an instruction requested by defendant covering its defense of waiver. If these two instructuons had been embodied in one, it would be clear that the jury could not have been misled by plaintiff's instruction. If the instructions were read to the jury in the order in which they appear in this record, there was but one short instruction between those two instructions. In view of the justice of the verdict we conclude that the jury were not misled to the prejudice of defendant. Defendant complains of the refusal of other instructons asked by him. One of them is based on his defense of waiver and omits reference to some of the evidence bearing on that subject. One of them speaks of a special property in the chattels replevied without telling the jury what constitutes special property. One of them would have told the jury that if "the probabilities for and aginst the proof of the plaintiff's claim are equally balanced," they should find for defendant. Another was framed to tell the jury that unless their verdict accorded with the law given by the court, the jury were guilty of wilful perjury. We approve of the refusal of these instructions. After the jury retirned the jury asked the court if in case they found for plaintiff they could give defendant a reasonable amount of damages for he care of the live stock while in the defendant's possession. The court gave them a written instruction telling them in effect that they could not do so, if

upon by plaintiff as defendant on this ground are stated and discussed in the following words and in many other cases there cited. Kenney v. City of Chicago, 222 Ill. 414; Ct.L.s Ill. Belt Ry. Co., v. Gunsavelle, 230 Ill. 114; Kehr v Chicago City Ry. Co., 223 Ill. 169; Chicago City Ry. Co., v. Carman, 228 Ill.200; Terre Cotta Water Co., v. Hanley, 214 Ill. 344. The court gave an instruction requested by defendant covering the defense of waiver. If these two instructions had been combined in one, it would be clear that the jury could not have been misled by plaintiff's instruction. If the instructions were read to the jury in the order in which they appear in this record, there was but one short instruct on between those two instructions. In view of the judgment of the verdict we conclude that the jury were not misled to the prejudice of defendant. Defendant complains of the refusal of other instructions asked by him. One of them is based on his defense of waiver and omits reference to one of the evidence bearing on that subject. One of them speaks of a special property in the plaintiff relieved without telling the jury what constitutes special property. One of them would have told the jury that if "the probabilities for and against the proof of the plaintiff's claim are equally balanced," they should find for defendant. Another was framed to tell the jury that unless their verdict accorded with the law given by the court, the jury were guilty of willful perjury. By reason of the refusal of these instructions, after the jury retired to jury-room the court if in case they found for plaintiff they could give defendant a reasonable amount of damages for the use of the live stock while in the defendant's possession. The court gave their written instruction telling them in effect that they could not do so. If

they found for plaintiff. It is contended this waserroneous. There was no pleading which raised any such issue. There w s no proof upon which such an allowance of damages could be made, and the jury could not be permitted to guess upon that subject. Defendant had the milk from two cows, part of the property in question, and there was no evidence what that was worth to defendant. The instruction was correct under the circumstances of this case.

We find no reversible error in the record, and the judgment is therefore affirmed.

They found for plaintiff. It is contended this constitutes. There was no finding which raised any such issue. There was no proof upon which such an allowance of damages could be made, and the jury could not be permitted to guess upon that subject. Taking the milk from the cows, part of the property in question, was done on evidence that was not sufficient to warrant. The instruction was correct under the circumstances of this case.

We find no reversible error in the record, and the judgment is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6684

(684a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

214 I.A. 674

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 18 1919

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6684

Val Weber Co., appellant.

vs Appeal from Co. Ct. Peoria.

A. Slocum, appellee

Dibell, J.

The Val Weber Company deals in potatoes at Princeville, Peoria County, Illinois, and George Weber, its secretary and treasurer, transacted in its behalf the business here involved. A Slocum deals in potatoes at Pequot Minnesota. A memorandum between said parties was signed "A. Slocum per B. W. Heath, agent." and by the Weber Company by George Weber as its secretary. By its language Slocum sold to the Weber Company two carloads of potatoes at a certain price named and of certain grades, to be shipped at once from Pequot to Princeville. With said memorandum the Weber Company made a check for $100 and the memorandum provided how the balance should be paid. The potatoes were not delivered. The price of potatoes rose and the Weber Company claimed to have been damaged by the non-fulfillment of the contract. The Weber Company brought this suit in attachment before a justice of ~~the~~ Peoria County and served a garnishee and obtained judgment before the justice. Slocum appealed to the county court. The county court quashed the attachment. A jury was waived and the merits were tried before the court and there was a finding and a judgment for defendant from which plaintiff appeals.

No propositions of law were offered by either party. The rulings of the court upon objections to testimony were almost universally favorable to plaintiff. It cannot complain of those. Heath was the son-in-law of Slocum and lived in Princeville and the court admitted over plaintiff's objections a letter, by Slocum to Heath, dated October 11, 1917. This letter was competent for two

Gen. No. 8024

Val Weber Co., appellant.

Va Appeal from Co. Ct. Peoria.

A. Bloomm, appellee

Dissell, J.

The Val Weber Co. ary ieals in potatoes at Pritnorville, Peoria County, Illinois and George Weber, its secretary and treasurer, transacted in its behalf its business here involved. A Bloomm deals in potatoes at Paquot Minnesota. A contract between said parties was signed "A. Bloomm per E. W. Heath, agent." and by the Weber Company by George Weber as its secretary. By its language Bloomm sell to the Weber Company two carloads of potatoes at a certain price named and of certain grades, to be shipped at once from Paquot to Pritnorville. With said contract the Weber Company made a check for $100 and the contract provides for the balance should be paid. The potatoes were not delivered. The price of potatoes rose and the Weber Company claimed to have been damaged by the non-fulfillment of the contract. The Weber Company brought this suit in attachment before a justice of the peace Peoria County and served a garnishee and obtained judgment before the justice. Bloomm appealed to the county court. The county court quashed the attachment. A jury was waived and the results were trial before the court and there was a finding and a judgment for defendant from which plaintiff appeals.

No propositions of law were offered by either party. The judge of the court upon objections to testimony were almost universally favorable to plaintiff. It cannot complain of those. Heath was the son-in-law of Bloomm and lived in Pritnorville and the court admitted over plaintiff's objection an a letter, by Bloomm to Heath, dated October 11, 1917. This letter was competent for any

reasons. According to defendant's evidence this was the only authority to sign the contract or to agree to the terms therein stated. Heath testified that Weber asked him if he could get potatoes of Slocum, and at Weber's request and expense Heath sent a telegram to Slocum, and that this letter was in answer thereto, and that before the name was signed he showed the letter to Weber and told Weber that he had no authority to enter into that contract and that it would be of no force unless ratified by Slocum, and that Weber insisted that he sign it and that he then signed it. Weber testified that Heath did read to him a letter from Slocum about potatoes, and that he stood where he could see it, and that this was before the name was signed; but he testified that this was not the letter so read to him, and that its contents were different. As plaintiff was suing upon a contract professing to be signed by Heath as agent, and the agency was denied by an affidavit filed by Slocum, plaintiff had the burden of proving the agency, and, as proposed purchaser of the merchandise, it was bound at its peril to ascertain the authority of the agent before it dealt with him as such. Davidson v Porter, 57 Ill. 300; Baxter v Lamont, 60 Ill. 337; Reynolds v Terrell, 26 Ill. 570; Radisch v Moore, 266 Ill. 106; Rogers Grain Co. v Tanton, 136 Ill. App. 533.

The only other question is one of fact, whether the court was warranted by the proof in finding for the defendant. As between the evidence of Weber and Heath, the court evidently believed Heath. We are unable to say that he should have believed Weber instead. If the court believed the evidence offered by defendant, the written memorandum relied upon by plaintiff was executed without authority by Heath and was never signed by Slocum. The letter from Slocum referred to above, as shown to Weber before the name was signed, asked what price Weber would pay for the potatoes, and conferred no authority. The parties corresponded afterwards, but

ranche. According to defendant's evidence this was the only authority to sign the contract or to agree to the terms therein stated. Veith testified that Weber asked him if he could get potatoes of Tiedum, and at Weber's request and expense Veith sent a telegram to Tiedum, and that this letter was in answer thereto, and that before the mark was signed he showed the letter to Weber and told Weber that he had no authority to enter into that contract and that it would be of no force unless ratified by Tiedum, and that Weber indicated that he sign it and that he then signed it. Weber testified that Veith did read to him a letter from Tiedum about potatoes, and that he stood upon he could see it, and that this was before the mark was signed; but he testified that this was not the letter so read to him, and that its contents were different. As plaintiff was suing upon a contract purporting to be signed by Veith as agent, and the agency was denied by an affidavit filed by Tiedum, plaintiff had the burden of proving the agency, and, as proposed producer of the evidence, it was bound at its peril to establish the authority of the agent. Failure to satisfy rule was such. Davidson v Turner, 47 Ill. 109; Baker v Lamont, 55 Ill. 327; Reynolds v Perry, 64 Ill. 170; Mutch v Reeves, 144 Ill. 106; Foster Grain Co. v Porter, 187 Ill. 49, 52.

The only other question is one of fact, namely the mark was authorized by the proof in finding for the defendant. In between the evidence of Weber and Veith, the court evidently believed Veith. We are unable to say that he should not have believed Weber instead. If the court believed the witnesses offered by defendant, the written memorandum relied upon by plaintiff was executed without authority by Veith and was never signed by Tiedum. The letter from Tiedum referred to above, as given to Weber before the mark was signed, asked what price Weber would pay for the potatoes, and conferred no authority. The position corresponded otherwise, but

never agreed, Weber insisting on his contract but consenting to some modifications, and Slocum stating his inability to fill the contract but his willingness to do something else. Slocum desired to sell potatoes to Weber, and loaded a car and billed it to him, but several hours before it could reach plaintiff, he received a letter from plaintiff, demanding more potatoes of a certain kind than he had in that car, and before the car reached Weber, Slocum countermanded the billing to Weber and ordered it billed to another customer instead, and made no effort thereafter to deliver potatoes to Weber. The court properly held that there was no subsequent ratification of the unauthorized contract.

As the court properly found for defendant, it is immaterial whether the grounds on which he quashed the garnishment were valid or otherwise.

Affirmed.

never agreed, Weber insisting on his contract but consenting to some modifications, and Slocum stating his inability to fill the contract but his willingness to do something else. Slocum desired to sell potatoes to Weber, and loaded a car and billed it to him, but several hours before it could reach plaintiff, he received a letter from plaintiff, demanding more potatoes of a certain kind than he had in that car, and before the car reached Weber, Slocum countermanded the billing to Weber and ordered it billed to another customer instead, and made no effort thereafter to deliver potatoes to Weber. The court properly held that there was no subsequent ratification of the unauthorized contract.

As the court properly found for defendant, it is immaterial whether the grounds on which he demurred the pleadings were valid or otherwise.

AFFIRMED.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

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